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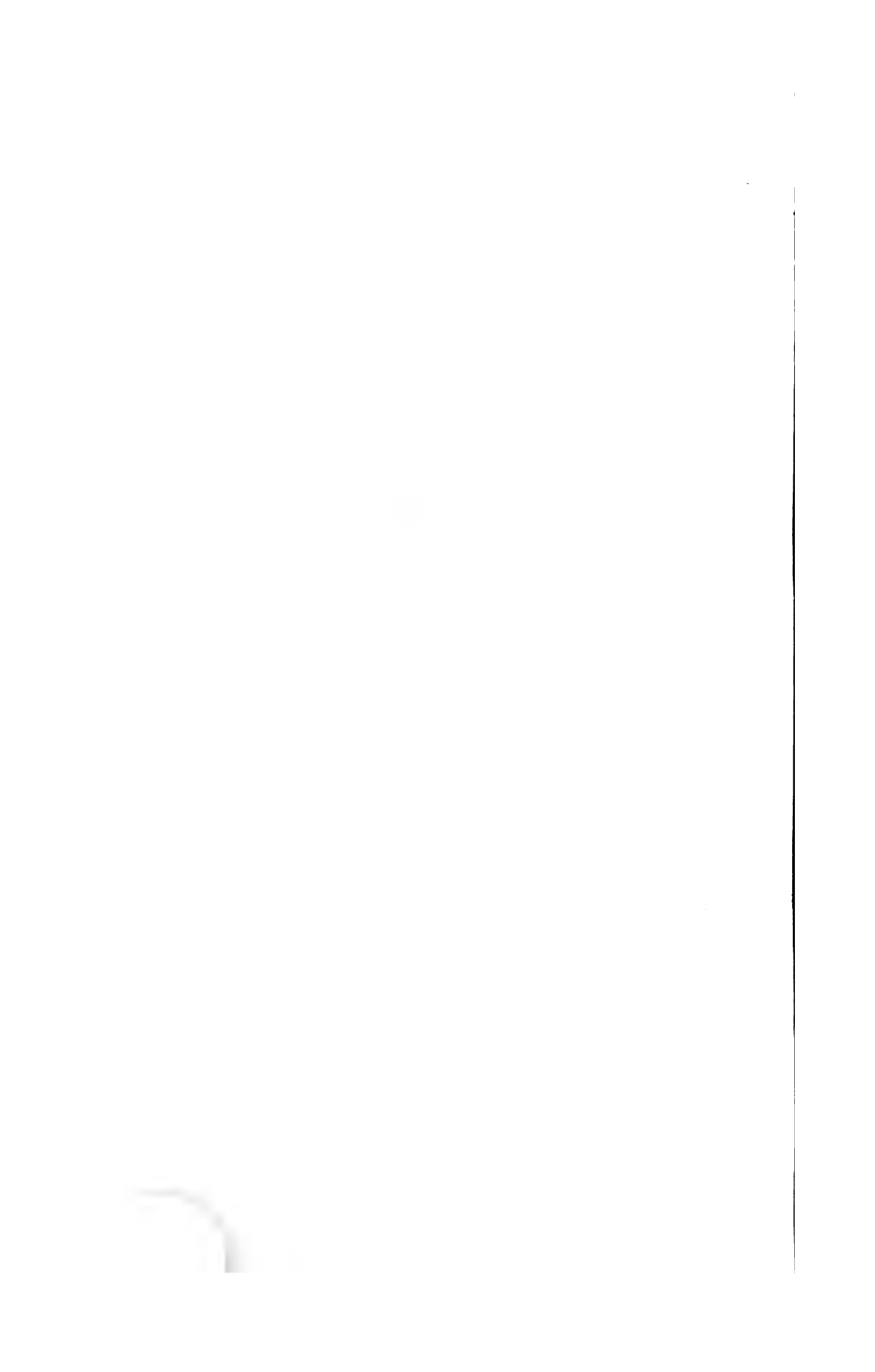
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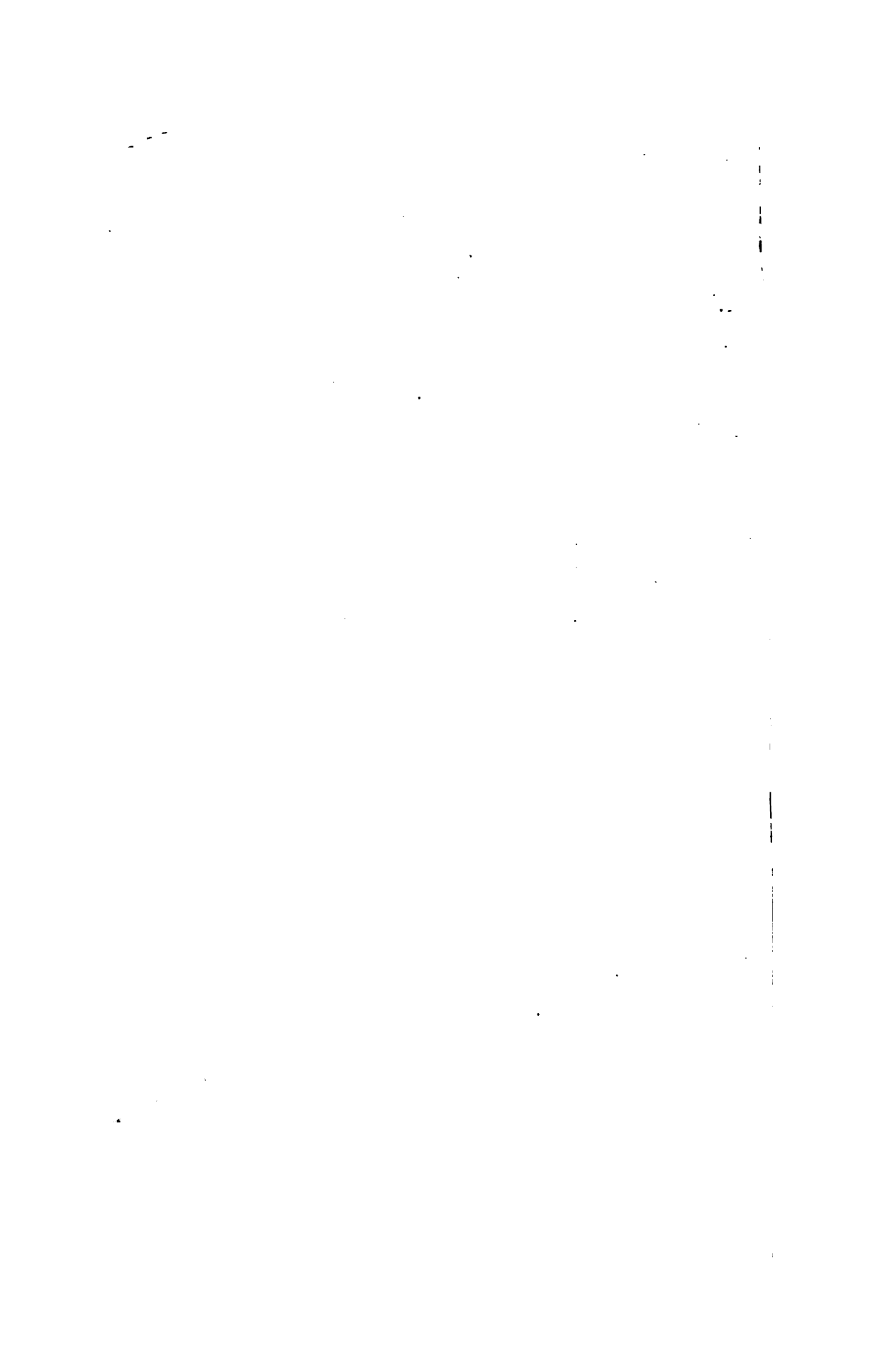
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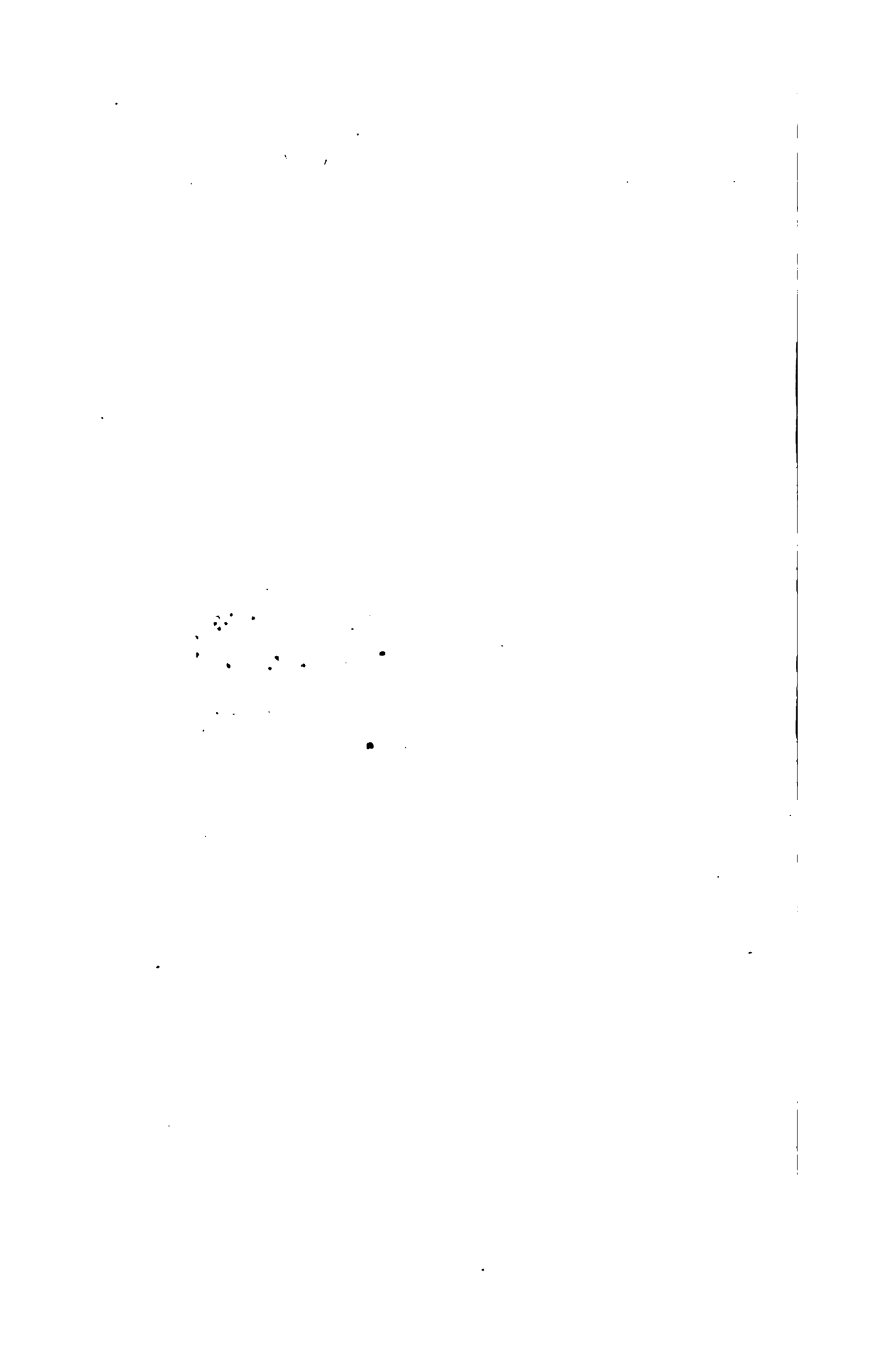
VOL. 3--INDIANA REPORTS.

3	16	3	70	3	129	3	213	3	277	3	337	3	401	3	449	3	510	3	567
5	447	27	384	11	164	3	372	20	198	11	290	4	577	7	605	7	505	3	571
42	62	45	474	21	148	34	8	57	356	20	64	3	403	9	576	7	704	6	30
53	905	116	509	31	252	75	87	3	284	37	246	6	533	16	146	10	49	11	493
3	21	3	72	91	200	95	244	7	109	59	561	45	346	39	259	13	407	3	570
13	92	3	297	3	140	3	215	3	285	77	105	108	276	46	117	18	328	4	143
3	26	4	83	3	132	14	425	4	339	79	85	3	404	48	445	41	178	6	12
9	405	5	143	53	231	48	482	9	285	82	238	21	11	66	310	57	458	6	30
		9	472	63	422	63	450	16	278	96	226	3	410	78	138	90	556	74	17
3	30	10	203	3	140	3	216	3	286	119	267	7	545	94	212	3	513	3	573
10	403	36	145	13	86	3	192	3	372	23	430	119	88	16	313	6	533	3	573
13	295	3	78	23	634	5	193	6	364	3	343	49	322	3	451	7	473	8	443
34	369	3	78	23	634	5	193	6	364	16	328	96	102	6	533	3	514	3	574
57	503	4	109	3	145	9	370	20	64	3	346	3	414	3	452	19	263	9	532
91	33	9	375	75	175	23	285	41	64	6	131	6	116	5	319	89	419	11	164
104	22	21	108	3	145	39	562	55	148	6	133	7	521	7	5	3	518	33	458
3	31	38	88	4	83	3	225	3	289	10	228	3	418	13	249	7	441	35	172
74	421	64	37	3	151	36	327	28	434	30	378	7	375	53	63	13	512	42	377
3	34	3	83	12	501	97	431	102	210	32	42	10	415	62	182	50	140	83	159
3	414	3	104	54	6	3	234	107	161	111	37	39	567	17	219	75	341	3	521
22	465	5	518	81	52	7	299	117	305	43	375	26	28	80	523	14	390	13	436
87	75	3	86	3	154	3	236	122	212	45	529	62	53	86	13	25	478	19	132
3	39	87	470	67	478	16	443	52	559	3	296	111	82	28	45	11	242	3	528
3	190	3	96	3	156	84	328	30	373	3	353	3	428	3	464	16	485	20	91
4	457	8	391	9	519	3	239	40	467	11	360	10	41	13	93	21	425	22	169
4	569	45	482	23	53	26	208	79	375	13	72	51	403	16	87	111	334	65	520
7	681	87	179	26	208	105	386	3	301	13	435	98	253	91	559	75	587	3	580
9	143	3	99	42	286	4	258	16	14	3	430	3	440	3	471	3	529	5	42
12	482	50	295	3	101	12	382	5	518	18	210	5	545	5	445	3	532	5	43
14	165	3	101	12	282	12	382	3	303	86	218	7	532	6	153	23	75	5	52
14	553	5	518	3	163	15	373	48	81	103	433	8	317	18	344	85	375	6	409
15	176	5	518	3	163	15	373	48	81	103	433	8	317	18	344	85	375	6	409
17	32	8	136	75	53	49	329	3	306	3	356	18	100	3	473	99	352	8	503
34	88	14	352	97	294	66	416	20	198	29	497	23	606	3	473	9	448	12	525
43	48	15	176	3	167	3	250	71	397	44	488	36	387	3	448	10	406		
60	402	25	51	3	167	18	86	3	316	82	300	3	431	3	479	43	69		
61	365	96	549	110	291	3	253	20	123	3	360	22	323	3	431	43	69		
62	479	97	465	3	170	6	151	29	104	7	92	32	393	3	480	6	364		
71	368	3	104	10	327	40	266	40	266	7	632	82	300	6	437	27	326		
78	289	6	9	12	253	41	555	27	82	3	436	51	412	3	481	34	400		
87	349	20	198	18	85	46	422	48	377	19	237	19	237	3	481	42	288		
93	37	21	89	97	100	92	561	59	532	3	438	11	143	3	438	11	143		
93	595	41	564	3	176	4	412	100	412	76	26	5	528	92	294	3	542		
3	43	51	294	9	282	8	228	114	316	99	591	7	273	3	485	10	473		
11	140	109	502	3	183	10	77	3	320	3	366	18	410	39	102	3	544		
3	47	3	107	6	483	76	424	3	320	20	174	35	375	51	40	8	520		
18	225	5	543	9	128	3	262	12	382	53	448	45	552	52	90	3	545		
47	390	6	76	3	187	16	401	37	182	66	339	48	551	97	219	12	172		
49	169	6	454	6	54	20	286	48	589	95	270	62	48	98	531	3	548		
59	352	7	291	3	188	3	265	67	499	3	367	65	42	3	494	6	47		
3	52	7	569	4	569	5	453	3	327	7	697	87	155	3	494	6	47		
9	476	8	444	3	190	11	86	3	372	3	369	3	441	9	483	3	549		
22	52	9	571	3	190	11	86	3	372	10	299	16	196	13	439	10	244		
23	210	12	125	20	177	55	210	72	522	10	299	24	304	36	309	3	552		
32	218	12	340	3	194	55	557	90	401	15	442	101	196	62	192	8	116		
64	495	33	63	7	521	3	267	100	76	39	241	3	444	3	497	8	282		
93	244	34	505	14	137	34	114	3	331	57	298	108	578	6	19	26	32		
3	53	40	266	53	471	3	268	3	331	57	298	108	578	6	19	26	32		
54	386	41	553	3	198	13	45	3	339	3	375	3	447	7	36	3	558		
3	59	57	185	10	299	3	273	45	415	17	80	3	449	9	318	7	299		
4	83	83	323	23	60	11	164	123	497	18	329	4	516	15	148	7	539		
5	143	112	428	44	357	89	560	3	334	93	177	5	516	15	148	7	539		
6	453	64	134	64	134	89	560	3	334	93	177	5	516	15	148	7	539		
9	499	3	118	3	203	3	275	40	156	3	384	105	314	8	367	9	529		
17	172	64	235	9	184	6	79	46	450	48	413	3	501	14	77	6	342		
36	145	3	125	12	616	7	405	64	403	49	331	3	501	14	77	6	342		
38	222	10	445	102	181	9	299	73	251	3	398	3	506	19	153	44	330		
63	93			3	210	17	220	100	118	10	299	3	506	19	153	44	330		
121	6			61	203	85	529			21	6	53	379	46	371	56	54		



INDIANA RĒPORTS.

VOL. III.



Indiana. Supreme Court

REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA



BEING AN OFFICIAL CONTINUATION OF ~~FLAHERS~~ REPORTS,

WITH TABLES OF THE CASES AND PRINCIPAL MATTERS.

BY ALBERT G. PORTER, A. M.,

OFFICIAL REPORTER.

VOL. III.

CONTAINING THE CASES FROM NOVEMBER TERM, 1851, TO NOVEMBER
TERM, 1852, BOTH INCLUSIVE.

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AUSTIN H. BROWN, PRINTER.

1853.

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Rec. Feb. 14 1856

21 4/1856

J U D G E S
OF THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

ISAAC BLACKFORD, LL. D.,

SAMUEL E. PERKINS,*

THOMAS L. SMITH,

ANDREW DAVISON,†

WILLIAM Z. STUART,†

ADDISON L. ROACHE.†

* Elected by the people on the 12th of *October*, 1852—having held the office from the 21st of *January*, 1846, to the period of his election, by appointment under the former constitution of the State.

† Elected by the people on the 12th of *October*, 1852.

The Supreme Court consists of four judges, who are elected, under the present Constitution of the State, for a period of six years, by the people. The Court now consists of Judges PERKINS, DAVISON, STUART, and ROACHE, who were sworn into office on the 3d of *January*, 1853.

TABLE

OF THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

A.		Brooks, Brown v.	518
Abshire v. Oline,.....	115	Brown, Higman v.	430
Aetna Insurance Company, Wilson v... 557		Brown, Larsh v.	234
Alden et al. v. Barbour et al.,	414	Brown v. Brooks,	518
Alvord et al., Davidson et al. v.	1	Buchanan, Bennett v.	47
Armstrong, The State v.	139	Burger, The State v.	448
Ashby v. West,.....	170	Burger v. Rice,	125
B.		Burgess v. Clark,.....	250
Bailey, Epperly v.	72	Burtch et al. v. Elliott,	99
Baker v. Leathers et al.,	558	Burton, The State v.	93, 95
Balls v. Haines,.....	461	Bush v. The Peru Bridge Company,...	21
Ball v. Carley,.....	577	Butterfield et al. v. Beall,.....	203
Barbee, The State v.	258	Byrket et al. v. The State,	248
Barbour et al., Alden et al. v.	414	C.	
Barlow, Administrator, Martin v.	367	Cannon, Vickers v.	29
Barrett v. Ruitt,.....	571	Carley, Ball v.	577
Bartholomew, Davis et al. v.	485	Carson et al. v. The Steam-boat Talma, 194	
Bates v. Halliday,.....	159	Carter v. Thomas,.....	213
Beall, Butterfield et al. v.	203	Cattron, The State v.	448
Beall v. Doe d. Butterfield,.....	208	Chase, West v.	301
Beaty, Rucker v.	70	Cheek et al. v. Glass,.....	286
Beckner et al., Pow v.	475	City of Madison, The State Bank v.	43
Beisel, Williams v.	118	City of Madison v. Ross,.....	236
Bennett v. Buchanan,.....	47	City of New Albany v. Meekin,	481
Bennett v. The State,.....	167	Clark, Burgess v.	250
Berry v. Makepeace,.....	154	Clark, Spears v.	296
Billingsley v. The State Bank,.....	375	Clark, The State v.	451
Blachley et al., Wright v.	101	Cline, Abshire v.	115
Blackwell, The State v.	529	Cline v. Lowe et al.,.....	527
Blake, Johnson v.	542	Clymer, Walker, Executor, v.	525
Blodget v. The State,.....	403	Coe, Holliday v.	26
Blount v. Riley,.....	471	Colerick et al. v. Hooper,	316
Board of Commissioners of Lagrange		Colgrove, Heaston v.	265
Co., Hobbs et al. v.	183	Commons, Wood v.	418
Board of Commissioners of Marion		Comstock, Edgerton, Administrator, v. 383	
County, Gaston v.	497	Conaway v. Shelton,	334
Bonewitz, First v.	546	Conklin v. Smith,.....	284
Bowden, The State v.	504	Conklin v. The White Water Valley	
Bowman et al. v. The State,.....	524	Canal Company,	506
Boylan v. Whitney et al.,.....	140	Conklin v. Waltz,.....	396
Bramble, Stockwell v.	428	Conwell et al. v. The State,	387
Brewer v. Thorp,.....	262	Cornwell, Usher v.	210

Covington, Coal-Creek, and Jackson-	
ville Plank-Road Company v. Moore,	510
Crane v. The State,	193
Cross et al., McIntire et al. v.	444

D.

Dallas v. Hollingsworth,	537
Davidson et al. v. Alvord et al.,	1
Davis et al. v. Bartholomew,	485
Dawson et al. v. Wells,	398
Decker v. Shaffer,	187
Degant, Hesler v.	501
Deitz, Houck v.	385
Delp, Harper v.	225
De Puy v. Everett,	257
Dinwiddie, Forkner et al. v.	34
Dobesberger, Pardun et al. v.	389
Doddridge, Manchester et al. v.	360
Dodds v. Toner,	427
Doe d. Butterfield, Beall v.	208
Doe d. Clendenning et al. v. Lanius	
et al., Executors,	441
Doe d. Harkrider et al. v. Harvey,	104
Doe d. Rush v. Kinney et al.,	50
Doe d. Searight et al. v. Swails,	329
Doe d. Smith, Hutchens v.	528
Doe d. Spencer, Harris et al. v.	494
Doe d. Tucker, Phillips v.	132
Doe v. Tevis et al.,	129
Donnell v. The State,	480
Doyle et al., Work et al. v.	436
Druly et al., The State ex rel. McCul-	
lough v.	431
Dumout et al., Harbert v.	346
Duncan et al., Executors, Wilcox v.	146
Dye, Smoot v.	517

E.

Earl et al., Huff, Administrator, v.	306
Eastman v. Ramsey,	419
Edgerton, Administrator, v. Comstock,	383
Elliott, Burtch et al. v.	99
Epperly v. Bailey,	72
Evans, Rogers et al. v.	574
Evans v. Secrest et al.,	541, 545
Everett, De Puy v.	257
Ex parte Robinson,	52

F.

Farrell et al. v. The State,	573
Fillingin et ux. v. Wylie et al.,	163
First v. Bonewitz,	546
Forkner et al. v. Dinwiddie,	34
Forney v. Goodhue,	247
Fowler v. Swift,	188
French v. Green,	267

G.

Gaston v. The Board of Commissioners	
of Marion County,	497

Givan v. Swadley,	484
Glasgow, Musgrave et al. v.	31
Glass, Cheek et al. v.	286
Goodhue, Forney v.	247
Gore et al., Gore v.	522
Gore v. Gore et al.,	522
Gorham v. Reeves et al.,	83
Green, French v.	267
Gregg et al., Gregg v.	305
Gregg v. Gregg et al.,	305
Gregg v. Strange,	366
Griffin, The Madison Insurance Compa-	
ny v.	277

H.

Haines, Balls v.	461
Halliday, Bates v.	159
Halsey v. Matthews,	404
Hamilton, Auditor, &c., v. The State,	452
Hamilton v. The State,	552
Hanna v. Spencer,	351
Harbert v. Dumont et al.,	346
Hardesty v. Smith,	39
Harper v. Delp,	225
Harris et al. v. Doe d. Spencer,	494
Harvey, Doe d. Harkrider et al. v.	104
Harvey et al., Harvey v.	473
Harvey v. Harvey et al.,	473
Hayes, The State Bank v.	400
Heaston v. Colgrove,	265
Henderson, The White Water Valley	
Canal Company v.	3
Henry v. Scott,	412
Henry v. The State Bank,	216
Hesler v. Degant,	501
Higman v. Brown,	430
Hobbs et al. v. The Board of Commis-	
sioners of Lagrange County,	183
Holliday v. Coe,	26
Hollingsworth, Dallas v.	537
Hooper, Colerick et al. v.	316
Houck v. Deitz,	385
Howe et ux., Keister v.	268
Howell v. Lemon et al.,	492
Hubbard, The State v.	530
Huff, Administrator, v. Earl et al.,	306
Hussey, Irons v.	158
Hutchens v. Doe d. Smith,	528

I.

Indiana Central Railway Company v.	
The State of Indiana and the Trustees of the Indiana Asylum for Educating the Deaf and Dumb,	421
Irons v. Hussey,	158

J.

Jarvis v. Sutton,	289
Johnson et al., May v.	449
Johnson et ux., Throp v.	343
Johnson v. Blake,	542

TABLE OF CASES.

ix

Jones, Admr., v. Van Patten,	107, 112	Matlocks, Vandever v.....	479
Jones et al. v. Ransom,	327	May v. Johnson et al.,	449
Jones, Rundles et al., Executors, v.	35	McAlpin v. The State,	567
Jones, The State v.....	449	McCartney v. The State,	353
Jornigan, Markin v.....	548	McClain et al., Malone v.	532
K.		McCoy, Manville v.	148
Keister v. Howe et ux.,	268	McCoy v. McCoy,	555
Keith, Reinhard v.....	137	McDaniel, Spangler et al. v.....	275
Kenworthy v. Tullis et al.,	96	McFarland, Oxford v.....	156
Kingore et al., Sloan v.....	549	McIntire et al. v. Cross et al.,	444
Kinney et al., Doe d. Rush v.....	50	McJunkin v. McJunkin,	30
Kintner et al. v. The State,	86, 92	McKinney v. Springer,	59
Kirkpatrick v. The State,	521	Meekin, The City of New Albany v....	481
Krahn, Templin v.....	373	Michigan Central Railroad Company et al., The Northern Indiana Railroad Company et al. v.	8
Kuns, Malaby et ux. v.	368	Michigan Central Railroad Company et al. v. The Northern Indiana Railroad Company et al.,	239
L.		Miller, Pruitt v.....	16
Lagrange County, Board of Commissioners of, Hobbs et al. v.....	183	Milliner, Likens v.....	539
Lamasco City, President, &c., of, Laughlin et al. v.	252	Moon v. The State,	438
Lamb, Sample v.....	180	Moore, The Covington, Coal-Creek, and Jacksonville Plank-Road Company v.	510
Lanius et al., Executors, Doe d. Olen-denning et al. v.	441	Morgan v. The Lawrenceburgh Insurance Company,	285
Larah v. Brown,	234	Morris, The State v.....	449
Laughlin et al. v. The President, &c., of Lamasco City,	252	Musgrave et al. v. Glasgow,	31
Lawrenceburgh, &c., Railroad Compa-ny v. Smith,	253	N.	
Lawrenceburgh Insurance Company, Morgan v.....	285	Neff v. The State,	564
Leathers et al., Baker v.....	558	New Albany, The City of, v. Meekin.,	481
Lemon et al., Howell v.....	492	Newcastle and Richmond Railroad Company v. The Peru and Indiana-polis Railroad Company,	464
Lewis v. Matlock et al.,	120	Nicklaus v. Roach et al.,	78
Likens v. Milliner,	539	Northern Indiana Railroad Company et al., The Michigan Central Railroad Company et al. v.....	239
Lindville v. The State,	580	Northern Indiana Railroad Company et al. v. The Michigan Central Railroad Company et al.,	8
Little v. White et al.,	544	North et al., Powell, Administrator, v.	392
Lowe et al., Cline v.....	527	O.	
Lower et al., Ragan et al. v.....	253	Oliphant, Williams v.	271
Lummi v. The State,	293	O'Neal v. Wade,	410
Lynch et al. v. Raleigh et al.,	273	Owensby v. Platt,	459
M.		Owings et al. v. Owings,	142
Maccoun, Ward et al. v.	407	Owings, Owings et al. v.	142
Madison, City of, The State Bank v.	43	Oxford, Admr., v. McFarland,	156
Madison, City of, v. Ross,	236	P.	
Madison Insurance Company v. Grif-fin,	277	Pardun et al. v. Dobesberger,	389
Makepeace, Berry v.	154	Parish et al. v. The State,	209
Malaby et ux. v. Kuns,	388	Pate v. The State Bank,	176
Malone v. McClain et al.,	532	Peabody et al. v. Sweet,	514
Manchester et al. v. Doddridge,	360	Peru and Indianapolis Railroad Compa-ny, The Newcastle and Richmond Railroad Company v.....	464
Mann et al., The State ex rel. Crandall v.	350	Peru Bridge Company, Bush v.....	21
Manville v. McCoy,	148		
Markin v. Jornigan,	548		
Markle v. The State,	535		
Martin v. Barlow, Administrator,	367		
Matlock et al., Lewis v.	120		
Matthews, Halsey v.	404		

TABLE OF CASES.

Phillips v. Doe d. Tucker,	132	Springer, McKinney v	59
Phillips et al. v. Ricards et al.,	401	Staker, The State v.	570
Platt, Owensby v.	459	Stallings, The State v.	531
Powell, Administrator, v. North et al.,	392	Starr, Upton v.	508
Pow v. Beckner et al.,	475	State Bank, Billingsley v.	375
Prather et al., Walker v.	112	State Bank, Henry v.	216
Prather v. The State Bank,	356	State Bank, Pate v.	176
President, &c., of Lamasco City, Laughlin et al. v.	252	State Bank, Prather v.	356
Pruitt v. Miller,	16	State Bank v. Hayes,	400
		State Bank v. Rodgers,	53
		State Bank v. The City of Madison, ...	43
		State, Bennett v.	167
		State, Blodget v.	403
		State, Bowman et al. v.	524
		State, Byrket et al. v.	248
		State, Conwell et al. v.	387
		State, Crane v.	193
		State, Donnell v.	480
		State et al., The Indiana Central Railway Company v.	421
		State, Farrell et al. v.	573
		State, Hamilton, Auditor, &c., v.	452
		State, Hamilton v.	552
		State, Kintner et al. v.	86, 92
		State, Kirkpatrick v.	521
		State, Lindville v.	580
		State, Lum v.	293
		State, Markle v.	535
		State, McAlpin v.	567
		State, McCartney v.	353
		State, Moon v.	438
		State, Neff v.	564
		State, Parish et al. v.	209
		State, Trimble v.	151
		State v. Armstrong,	139
		State v. Barbee,	258
		State v. Blackwell,	529
		State v. Bowden,	504
		State v. Burger,	448
		State v. Burton,	93, 95
		State v. Cattron,	448
		State v. Clark,	451
		State v. Druly et al.,	431
		State v. Hubbard,	530
		State v. Jones,	449
		State v. Mann et al.,	350
		State v. Morris,	449
		State v. Staker,	570
		State v. Stallings,	531
		State v. Virt,	447
		State, Watson v.	123
		State, Willey et al. v.	500
		State, Zion et al. v.	397
		Steam-Boat Talma, Carson et al. v.	194
		Stevens, Smith et al. v.	332
		Stockwell et al. v. Walker et al., ..	215, 384
		Stockwell v. Bramble,	428
		Strange, Gregg v.	366
		Sutton, Jarvis v.	269
		Swadley, Givan v.	484
		Swails, Doe d. Searight et al. v.	329
		Sweet, Peabody et al. v.	514
		Swift, Fowler v.	188
		Symons v. Smith,	264

R.

Ragan et al. v. Lower et al.,	253
Raleigh et al., Lynch et al. v.	273
Ramsey, Eastman v.	419
Ransom, Jones et al. v.	327
Redman v. Taylor,	144
Reeves et al., Gorham v.	83
Reinhard v. Keith,	137
Reister, Administrator, Thomas v.	369
Reynolds, Sherry v.	201
Ricards et al., Phillips et al. v.	401
Rice, Burger v.	125
Riley, Blount v.	471
Rosch et al., Nicklaus v.	78
Robertson v. Thompson,	190
Robinson, Ex parte,	52
Rodgers, The State Bank v.	53
Rogers et al. v. Evans,	574
Ross, The City of Madison v.	236
Rucker v. Beaty,	70
Ruitt, Barrett v.	571
Rundles et al., Executors, v. Jones, ...	35

S.

Sample v. Lamb,	180
Sansberry, Sherry v.	320
Scott, Henry v.	412
Secrest et al., Evans v.	541, 545
Shaffer, Decker v.	187
Shaffer, Yost v.	331
Shelton, Conaway v.	334
Sherman et al. v. Sherman,	337
Sherman, Sherman et al. v.	337
Sherry v. Reynolds,	201
Sherry v. Sansberry,	320
Sloan v. Kingore et al.,	549
Smith, Conklin v.	284
Smith et al., Smith v.	303
Smith et al. v. Stevens,	332
Smith, Hardesty v.	39
Smith, Symons v.	264
Smith, The Lawrenceburgh, &c., Railroad Company v.	253
Smith v. Smith et al.,	303
Smoot v. Dye,	517
Sofield v. The White Water Valley Canal Company,	179
Spangler et al. v. McDaniel,	275
Spears v. Clark,	296
Spencer, Hanna v.	351

TABLE OF CASES.

xi

T.		Ward et al. v. Maccoun,	407
Taylor, Redman v.	144	Watson v. The State,	123
Taylor v. Webster,	513	Webb, Trullinger v.	198
Templin v. Krahn,	373	Webster, Taylor v.	513
Tevis et al. v. Dge,	129	Wells, Dawson et al. v.	398
Thomas, Carter v.	213	West, Ashby v.	170
Thomas v. Reister, Administrator,	369	West v. Chase,	301
Thompson, Robertson v.	190	White et al., Little v.	544
Thorp, Brewer v.	262	White Water Valley Canal Company, Conklin v.	506
Throp v. Johnson et ux.,	343	White Water Valley Canal Company, Sofield v.	179
Timmons et al. v. Timmons,	251	White Water Valley Canal Company v. Henderson,	3
Timmons, Timmons et al. v.	251	Whitney et al., Boylan v.	140
Toner, Dodds v.	427	Wilcox v. Duncan et al., Executors, . .	146
Trimble v. The State,	151	Wiley, Withrow et al. v.	379
Trullinger v. Webb,	198	Wiley et al. v. The State,	500
Tullis et al., Kenworthy v.	96	Williams v. Beisel,	118
U.		Williams v. Oliphant,	271
Upton v. Starr,	508	Williams v. Williams,	222
Usher v. Cornwell,	210	Wilson v. The Aetna Insurance Company,	557
V.		Withrow et al. v. Wiley,	379
Vandever v. Mattocks,	479	Wood v. Commons,	418
Van Patten, Jones, Adm'r, v.	107, 112	Work et al. v. Doyle et al.,	436
Vickers v. Cannon,	29	Wright v. Blachley et al.,	101
Virt, The State v.	447	Wylie et al., Fillingin et ux. v.	163
W.		Y.	
Wade, O'Neal v.	410	Yost v. Shaffer,	331
Walker et al., Stockwell et al. v. . . .	215, 384	Z.	
Walker, Executor, v. Clymer,	525	Zion et al. v. The State,	397
Walker v. Prather et al.,	112		
Waltz, Conklin v.	396		

PREVIOUS DECISIONS

OF THE

SUPREME COURT OF THIS STATE

OVERRULED IN THIS VOLUME.

HOAGLAND v. MOORE, 2 Blackf. 671.

Where there is a special contract, one party cannot perform a part of the contract, and, before an entire performance, sue and recover, in indebitatus assumpsit, for the part he has performed, unless he has been prevented from completing it by the acts or the failure of the other party.

Overruled in *McKinney v. Springer*, 59, and *Epperly v. Bailey*, 72.

SWIFT v. WILLIAMS, 2 Carter's Ind. R. 365.

A. entered into a contract with B. to make a road for B. for a stipulated price. Having performed about one-half of the work, but not in the manner stipulated by the contract, he voluntarily abandoned it, and sued B. for the value of the work done. *Held*, that, the contract being an entire one, A. could not recover the price, or any part of it, without having first made the road substantially according to the contract, or shown a legal excuse for the non-performance.

Overruled in *McKinney v. Springer*, 59, and *Epperly v. Bailey*, 72.

WILLS v. THE STATE, 4 Blackf. 457.

Upon the trial of a prisoner for grand larceny, the jury found him guilty of petit larceny, and their verdict was as follows: "We find the defendant guilty of petit larceny, and that he be imprisoned," &c. Motion in arrest of judgment overruled, and judgment on the verdict. *Held*, that the verdict did not authorize the judgment, as the defendant might have been guilty of petit larceny without being guilty of the larceny charged in the indictment.

Overruled in *Moon v. The State*, 438.

EASTWOOD v. BUEL, 1 Carter's Ind. R. 434.

A confessed judgment rendered by a justice of the peace in favor of his brother is not void, under the R. S. 1843.

Overruled in *Dawson v. Wells*, 398.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1851, IN THE THIRTY-
SIXTH YEAR OF THE STATE.

DAVIDSON and Another, Executors, v. ALVORD and An-
other.

A writ of *scire facias* to revive a judgment stated the time of the rendition of the judgment, that execution remained to be done, and commanded the sheriff to summon the defendant to answer why the plaintiffs should not have execution. *Held*, that the writ averred, substantially, that the judgment remained unsatisfied.

Where the Circuit Court before which, and the time at which, a party is summoned to appear, are specified in the writ, he cannot object that the place where the Court was to be held was not sufficiently indicated.

The suggestion of the death of one of two defendants to a *scire facias* to revive a judgment, is equivalent to a dismissal as to such defendant.

A writ of *scire facias* to revive a judgment may be amended, under the R. S. 1843, at any time before judgment, by striking out the name of one of several defendants.

The R. S. 1843 authorize the issuing of a *scire facias* to revive a judgment against the personal representatives of a deceased defendant.

• APPEAL from the Marion Circuit Court.

SMITH, J.—This was a *scire facias* to revive a judgment of the Marion Circuit Court against *Allen McLain* and *Noah Noble*. The writ states that the judgment was ren-

Monday,
November 24.

Nov. Term,
1851.

DAVIDSON
v.
ALVORD.

dered in *June*, 1842; that execution remains to be done; that *Noble* has since died; that *Alexander H. Davidson* and *George H. Dunn* are his executors; and commands the sheriff to summon *McLain* to answer why the plaintiffs should not have execution against him; and also, to summon *Davidson* and *Dunn* to answer why execution should not issue against them, as executors, to be levied of the goods and chattels of the testator.

At the *April* term, 1849, the parties appeared, and the defendants filed a special demurrer to the writ of *scire facias*.

The first cause of demurrer was, that the writ does not state *where* the Court was to be holden at which the defendants were notified to appear. The defendants were summoned to appear "before the judges of said Court on the first day of the next term thereof, to be holden on the fifth *Monday* of *April*, instant," &c.

The second cause of demurrer was, that the writ does not aver that the judgment remained unsatisfied.

There is nothing in these objections. The writ does aver, substantially, that the judgment remains unsatisfied.

At the *October* term, 1849, the death of the defendant, *McLain*, was suggested, and, afterwards, the demurrer, filed at the previous term, was overruled.

The defendants failing to answer further, the plaintiffs then obtained a judgment against the executors of *Noble*, to be levied *de bonis testatoris*.

The defendants below, now the appellants, insist that it is a fatal objection to the *scire facias*, that the survivor, *McLain*, and the representatives of the deceased joint debtor, *Noble*, are joined.

But if this objection was tenable at the commencement of the suit, it ceased to have any force when *McLain's* death was suggested, as this was equivalent to a dismissal of the suit as to him, and at any stage of the case prior to the judgment the plaintiffs might have amended the writ by striking out his name. R. S. c. 40, s. 98.

The Revised Statutes of 1843 authorize the issuing of a

scire facias to revive a judgment against the personal representatives of a deceased defendant. Chapter 48, s. 89.(1.)

Pec Curiam.—The judgment is affirmed with costs.

J. L. Ketcham and *N. B. Taylor*, for the appellants.

H. C. Newcomb, for the appellees.

Nov. Term,
1851.

THE WHITE
WATER VAL-
LEY CANAL
COMPANY
V.
HENDERSON.

(1) The proceeding by *scire facias* to revive against judgment-defendants has been abolished by the R. S. 1852; but an execution cannot be issued after the lapse of five years from the entry of judgment, except by leave of the Court, upon motion, supported by the oath of the party, or other satisfactory proof, that the judgment, or a part thereof, remains unsatisfied and due. Ten days' personal notice must also be given to the adverse party, unless he be absent, or non-resident, or cannot be found, when notice may be given by publication as in an original action, or in such other manner as the Court shall direct. R. S. 1852, vol. 2, p. 129.

After the decease of a judgment-debtor, a proceeding in the nature of a *scire facias* against his heirs, devisees, or legatees, or the tenant of real property owned by him and affected by the judgment, and his personal representatives, is requisite, under the R. S. 1852, in order to authorize the issuing of an execution to enforce the judgment against the estate of such debtor in their hands respectively, and the mode of proceeding is specifically pointed out by the statute. R. S. 1852, vol. 2, p. 181.

The death of the defendant, after the execution is placed in the hands of the sheriff, does not affect subsequent proceedings thereon, except that the portion allowed absolutely to the widow by law, is exempt from levy and sale. R. S. 1852, vol. 2, p. 147.

THE WHITE WATER VALLEY CANAL COMPANY v. HENDERSON.

8 8
154 878

Process returnable at a day fixed by law, is deemed and taken to be returnable at such day, by enactment of the R. S. 1843, although a different day may be named in the process.

One of several material facts averred in a plea may properly be traversed by the replication.

By the provisions of the charter of the *White Water Valley Canal Company*, and also by the general statute, the award upon which this suit was brought was in the nature of a judgment of a justice of the peace, and, not having been appealed from, is conclusive.

The discovery of evidence unknown to a party at the time of a former trial, cannot be made the basis of a good plea in a collateral suit.

The fraudulent concealment by a party to an arbitration, of a fact material to the defense of the adverse party, cannot be pleaded by the latter as a valid defense to an action at law by the former upon the award.

Nov. Term, 1851. An award is sufficient, under the R. S. 1843, if signed by a majority of the arbitrators.

THE WHITE WATER VALLEY CANAL COMPANY.
v.
HENDERSON.

In an action against the *White Water Valley Canal Company* upon an award of damages for injury done by the latter to the plaintiff by entering upon his land and taking materials for the construction of the canal, the defendant offered to prove, as an offset to the damages claimed by the plaintiff, that, at the time of committing the injuries complained of, the premises were the real estate of one J., who was the owner of a large tract of land of which said premises were a part, and that the arbitrators, in determining upon their award, refused to take into account the benefits and advantages to the whole of said tract, while owned by J., resulting from the construction of the canal. *Held*, that the Circuit Court properly rejected the evidence.

Monday,
November 24.

ERROR to the *Fayette* Circuit Court.

SMITH, J.—This was an action of debt brought by the defendant in error against the plaintiff in error.

The declaration alleges that differences having arisen between the parties relative to certain lands and materials taken by the canal company for the construction of their canal, the plaintiff, on the 6th of *February*, 1845, selected one *Hyatt* as an arbitrator on his part, and the defendant selected one *Clements*, and those two selected one *Masters* as the third arbitrator, for the purpose of arbitrating said differences, pursuant to the act of incorporation of 1842 (1); that said arbitrators, on said day last named, made and published their award in writing, signed by two of said arbitrators, awarding the plaintiff 2,000 dollars; which said award was, on the 21st of *February*, 1845, duly reported to the secretary of said company; that said sum so awarded had not been paid, &c.

At the first term of the Court after the declaration was filed, the parties appeared and the defendant moved the Court to quash the writ of summons issued in the case, because it was made returnable on the first *Monday* of *April*, 1849, when, in fact, the term of the Court to which it should have been made returnable began on the second *Monday* in *April*, 1849. This motion was overruled.

The defendant then filed three pleas.

The first plea avers that, on the 15th of *June*, 1835, one *Jenks*, pursuant to the 14th section of the canal act of *February* 6th, 1835, released to one *Morgan*, a commis-

sioner of the state, the right of way for the canal through all the lands owned by him in *Franklin* county, and all damages to said lands; that said deed of release was duly filed in the office of the secretary of state previous to the succeeding session of the legislature. It is then averred that the lands for which damages were awarded to the plaintiff, at the time of the execution of the release, belonged to *Jenks*, and were situated in *Franklin* county; that the plaintiff is the grantee of said *Jenks*, and that the defendant had no knowledge of that fact at the time of the arbitration nor until after the time prescribed for taking an appeal therefrom; and that the defendant had no knowledge, until long after the time for taking an appeal had elapsed, of the existence of said deed of release, it having been lost or mislaid by the secretary of state in his office; and that its execution and existence were fraudulently concealed by the plaintiff and *Jenks* from the defendant, wherefore it could not be set up as a defense at the arbitration, although the defendant had used reasonable diligence to ascertain its existence.

The second plea is similar to the first, except that it simply avers that the defendant had no knowledge of the deed of release until after the time for taking an appeal from the award had passed, and omits the averments that it had been lost or mislaid and that the plaintiff had fraudulently concealed the fact of its existence.

The third plea craved oyer of the submission and award referred to in the declaration, and the same being set out, it appeared to have been signed by *Hyatt* and *Masters*, and that *Clements* protested against it "as unjust," and thereupon the defendant said "he does not owe and is not indebted to the plaintiff in manner and form as alleged," concluding to the country.

The plaintiff craved oyer of the release averred in the first plea, and it being read to him, he denied that its existence was fraudulently concealed from the defendant by the plaintiff and *Jenks*.

The plaintiff demurred to the second plea, and added the similitur to the issue tendered by the third plea.

Nov. Term,
1851.

THE WHITE
WATER VAL-
LEY CANAL
COMPANY
V.
HENDERSON.

Nov. Term,
1851.

THE WHITE
WATER VAL-
LEY CANAL
COMPANY
V.
HENDERSON.

The defendant demurred to the replication to the first plea.

The Court overruled the demurrer to the replication, and sustained the demurrer to the second plea.

The cause was then submitted to the Court upon the issue made by the third plea, which was found for the plaintiff. Judgment was thereupon rendered for 2,000 dollars, the amount of the award, and 561 dollars and 66 cents damages for the detention of the debt from *February 6th, 1845*.

Upon the trial of the cause, the plaintiff offered in evidence the report and award of the arbitrators, to the sufficiency of which to sustain the plaintiff's action the defendant objected, but the objection was overruled.

The defendant offered to prove that, at the time of committing the supposed injuries to the plaintiff, the premises injured were the real estate of *Samuel Jenks*, who was the owner of a large tract of land of which the said premises were part and parcel; and that the arbitrators refused to take into account, in assessing their award, the benefits and advantages to the said *Jenks* resulting from the construction of the canal to the whole of his said lands, of which this was parcel, as an offset to the damages claimed by the plaintiff; which evidence the Court refused to admit.

The first error assigned is the overruling of the defendant's motion to quash the writ of summons. By the 25th section of chapter 40, R. S. 1843, p. 674, all writs of summons must be made returnable on the first day of the next term; and by the 13th section of the 36th chapter, p. 624, it is enacted that all process returnable at a day fixed by law, shall be deemed and taken to be returnable at such day, although a different day may be named in such process. The defect in the writ issued in this case is, therefore, cured by the statute.

The second and third errors assigned are, that the Court erred in overruling the demurrer to the replication to the first plea, and in sustaining the demurrer to the second plea.

The replication denies that the existence of the release mentioned in the plea was fraudulently concealed from the defendant. If the averment in the plea, that the release was fraudulently and collusively concealed from the defendant, was material and necessary, it was, of course, competent for the plaintiff to traverse it. The second plea is without that averment and is, we think, clearly bad.

Under the statutory provisions contained in the charter of the plaintiff in error, and in the general law relative to awards, the award of the arbitrators in this case stood in the nature of a judgment of a justice of the peace, and was conclusive if not appealed from. See case between the same parties in 8 Blackf. 528; *Parker and Helm v. Henderson*, Ind. R. 28 (2); R. S. 1843, c. 44, p. 786. The second plea is in effect, that since the award was made the defendant has discovered evidence which might have produced a different result if it had been before the arbitrators, but of the existence of which the defendant was ignorant until after the time within which an appeal could be taken had elapsed. The discovery of evidence which was unknown to a party at the time of a former trial, may afford grounds for a motion, or a bill in chancery to obtain a new trial, but it certainly cannot be made the basis of a good plea in a collateral suit.

The first plea differs from the second only in the averment that the facts, the discovery of which are so pleaded, were fraudulently concealed from the defendant by the plaintiff at the time the case was before the arbitrators. It is unnecessary now to decide whether this averment adds anything to the sufficiency of the plea, though we are of opinion that it does not. It has been heretofore decided by this Court, that, in an action on a judgment, a plea that the judgment was obtained by fraud is insufficient—*Hutton v. Denton*, November term, 1850 (3)—and also, that, in an action on an award, the award cannot be impeached for misconduct of the arbitrators. The proper remedy in either case is by bill in chancery to

Nov. Term,
1851.

THE WHITE
WATER VAL-
LEY CANAL
COMPANY
V.
HENDERSON.

Nov. Term,
1851.

THE NORTH-
ERN INDIANA
RAILROAD
COMPANY
V.
THE MICHIGAN
CENTRAL
RAILROAD
COMPANY.

have the judgment or award set aside. *Hough v. Beard*, 8 Blackf. 158.—*Elliott v. Adams*, id. 103.

The next error assigned is the refusal of the Court to sustain the defendant's objection to the admission of the award in evidence. The ground of objection is, that it was signed by two of the arbitrators only. We think this objection is answered by reference to the statute, which authorizes awards to be signed by a majority of the arbitrators. (4.)

The only other question raised by the plaintiff in error is in reference to the rejection of the parol evidence offered as a defense on the trial of the issue submitted. We think, for reasons already given, that evidence was rightly excluded.

Per Curiam.—The judgment is affirmed with 1 per cent. damages and costs.

J. Rariden, for the plaintiffs.

J. D. Howland, for the defendant.

(1) Local Laws of 1842, p. 37. (2) 1 Carter's Ind. R. 62. (3) 2 Carter's Ind. R. 644. (4) R. S. 1843, p. 788, s. 9.

THE NORTHERN INDIANA RAILROAD COMPANY and Others v.
THE MICHIGAN CENTRAL RAILROAD COMPANY and Others.

Monday,
November 24.

THE motion to which the following remarks of judge *Smith* are applicable, was decided at the last term of the Court, and the opinion of the Court may be found in 2 Carter's Ind. R. 670. Judge *Smith*, who granted the order extending the operation of the appeal, to discharge which order was the object of said motion, proceeded, on the first day of the present term, to read the following remarks:

SMITH, J.—Motion to set aside an order extending the operation of an appeal, taken from the decision of the president judge of the *Laporte* Circuit Court granting an injunction.

Having, at the time this motion was argued, announced an intention to give, at a convenient opportunity, my views in writing upon the questions raised by it, I will now proceed to do so.

On the 28th of *August* last, the appellees, having previously filed a bill of complaint in the *Laporte* Circuit Court, applied to the president judge thereof, in vacation, for an injunction to restrain the appellants from constructing a railroad over certain land and across the railroad of the appellees, and from building or using a railroad from *Michigan City* to the west line of the state, running parallel with the railroad of the appellees. The case is now in this Court on an appeal from the order of the president judge granting such an injunction.

The 70th section of c. 37, R. S., p. 636, authorizes an appeal to be taken from any interlocutory order or decree of a Circuit or Probate Court granting or dissolving an injunction; but the 72d section provides that such an appeal "shall not stay the proceedings in the Court below upon such order or decree," for a longer time than thirty days, "unless the Supreme Court in term, or some judge thereof in vacation, shall make an order to the effect that such order or decree be stayed."

Two subsequent acts, one passed in 1845, and another in 1849, give authority to any judge of the Supreme Court to order a *supersedeas* either in term time or in vacation.

On the 22d of *September*, an order, such as is contemplated by the 72d section of the statute above quoted from, was made by me upon the application of the appellants. The members of the Court had, at that time, separated. I was at a distance from my colleagues, and having no opportunity to consult with them, the order was made without any participation on their part.

On the 23d of *October*, the judges of this Court met, at

Nov. Term
1851.

THE NORTH-
ERN INDIANA
RAILROAD
COMPANY
V.
THE MICHIGAN
CENTRAL
RAILROAD
COMPANY.

Nov. Term,
1851.

THE NORTH-
ERN INDIANA
RAILROAD
COMPANY
v.
THE MICHIGAN
CENTRAL
RAILROAD
COMPANY.

the request of the counsel for the appellees, to hear a motion to have the order so made set aside. The motion was based upon the following propositions:

1st. That this Court was still in session, the term which commenced in *May* last not having been ended by a final adjournment; and, therefore, a single judge had no authority to make the order in question.

2d. That a rule of this Court required the record to be filed in the clerk's office before the order was made, which was not done.

3d. That the appeal was void, and this Court had no jurisdiction of the cause.

Counsel representing the appellants were present when this motion was offered to be made, but they refused to enter an appearance or to consent to its being heard. On the contrary, they, as friends of the Court, insisted that the appellants could not be required to appear and show cause against such a motion at that period of the term. Consequently, a question was raised as to whether the motion of the appellees could then be entertained.

There are two terms of the Supreme Court in each year. Each term is to consist of thirty days, unless the business shall be sooner disposed of, and may be enlarged beyond that time if the Court shall deem it expedient and necessary.

The practice of the Court is to meet at the court room at the commencement of each term, and continue its sittings there from day to day, so long as the parties or their counsel have any business to bring before it. During these sittings, the docket is called for the purpose of enabling either party to require the appearance of his adversary, and to take such steps as may be deemed requisite or necessary in the absence of his opponent, if the latter fails to appear. Usually, it is not found necessary to continue the sittings of the Court, for these purposes, more than two or three weeks, and the ordinary routine of business in Court being then terminated, the suitors and members of the bar in attendance from different parts of the state disperse and return to their homes.

The judges, however, continue to meet at their chambers to examine the cases submitted, and to consult upon their decisions; and it has been found convenient to enlarge the terms or continue the Court in session for the purposes of receiving petitions for rehearing, rendering judgments on submitted cases, entering orders by the consent of the parties, and hearing and determining such matters as could properly be presented *ex parte*. It has, indeed, grown to be the practice to keep the Court constantly open for these purposes, and for many years the final order of adjournment at each term has been made on the *Saturday* preceding the *Monday* on which the next term commenced. But it has always been understood that, after the Court had ceased to meet at the court room from day to day, no parties could be compelled to appear during the remainder of the term, and no business could be transacted without the consent of all the parties entitled to be heard. There is no rule of Court to that effect, but this understanding has been constantly acted upon both by the Court and bar, and a different course could not now be adopted with propriety.

The counsel of the appellees were, therefore, informed that, as the Court could not, consistently with the uniform practice, at that period of the term, require the appearance of the adverse party, a motion upon which such party would be entitled to be heard could not then be entertained; and that, so far as this motion was founded on an alleged want of jurisdiction in this Court, it was, in the opinion of the judges, of that character. The motion being then argued as one of an *ex parte* nature, it was, after giving the subject a careful consideration, overruled.

It is provided in the same chapter of the Revised Statutes before quoted (s. 36, p. 632,) that no writ of error shall "stay or supersede" execution on the judgment of the inferior Court, unless the Supreme Court in term, or a judge thereof in vacation, after inspecting the errors assigned on the record, shall make an order to that effect; which order shall be indorsed by the clerk of the Supreme

Nov. Term,
1851.

THE NORTH-
ERN INDIANA
RAILROAD
COMPANY
v.
THE MICHIGAN
CENTRAL
RAILROAD
COMPANY.

Nov. Term,
1851.

THE NORTH-
ERN INDIANA
RAILROAD
COMPANY
v.
THE MICHIGAN
CENTRAL
RAILROAD
COMPANY.

Court on the writ of error. In our practice, a writ of error is seldom or never issued, the statute making it sufficient for the plaintiff in error to file in this Court a transcript of the proceedings in the inferior Court, with an assignment thereon of the errors upon which he intends to rely. It therefore becomes necessary that the inferior Court should be informed of the order of the Supreme Court, or of one of the judges, that the proceedings on error shall "stay or supersede" execution, by some other mode than by indorsement on the writ of error, and this is usually done by the clerk of the Supreme Court sending down what is called a writ of *supersedeas*. This is a conditional writ, and becomes operative upon the filing, by the plaintiff in error, of a bond similar to that required in cases of appeal.

The statute also provides (s. 40) that upon the granting of an appeal, the appeal-bond "shall operate to stay and supersede execution, and all other proceedings on the judgment or determination appealed from, in the Court below, from the time of taking such appeal, in like manner and for the same length of time as is provided in cases of writs of error." Here then is no necessity for a writ of *supersedeas* to issue from the Supreme Court, the appeal-bond being filed in the Court from which the appeal was taken, and being made to operate of itself as a *supersedeas*.

That the statute gives precisely the same effect to the bond in cases of appeal, as to the *supersedeas* granted in cases of writs of error, is still more apparent from the 41st section, which commences with these words:

"The filing and approval of the appeal-bond, or bond to stay and supersede execution in case of a writ of error, shall operate to stay and supersede execution until the final determination of such writ of error or appeal," &c.

In truth, the prosecution of a writ of error is only another mode of taking an appeal. An appeal, technically so called, must be taken at the term at which the judgment of the inferior Court is rendered; but, by means of the writ of error, an appeal from such a judgment may

be taken at any time within five years. The legislature has, however, thought proper to place this check upon the removal of causes to a higher Court when the dissatisfied party has not, immediately on the decision against him, manifested his determination to do so by an appeal, that he shall not afterwards have the execution of the judgment delayed, while he is making his application to the superior Court for its reversal, without first submitting the errors he complains of to that Court, or one of the judges, and procuring an order to that effect. In other respects there is no material difference in their operation and effects between an appeal and a writ of error.

What has been thus far said of appeals has been in reference to appeals from final judgments. When an appeal is taken from an interlocutory judgment, the statute interposes a check similar to that just noticed. The appeal operates as a *supersedeas* exactly as in other cases of appeal from final judgments, but it continues so to operate only thirty days, unless an order is made by the Supreme Court or one of the judges similar to that required in cases of writs of error.

We were, therefore, of opinion that an order to extend the operation of an appeal from an interlocutory judgment, such as was made in the present case, is in its nature precisely similar to an order granting a *supersedeas*; that it is in fact a *supersedeas* within the meaning and intent of the statute; and as, by the acts passed in 1845 and 1849, the power to grant a *supersedeas* is given to a single judge in term time as well as in vacation, it was unnecessary to examine whether, at the time the order in question was made, there was or was not, practically, such a vacation of the Court as would have authorized a single judge to make the order under the provisions of the 72d section of the 37th chapter of the Revised Statutes.

The rule of Court referred to by the appellee, is one made to facilitate business while the Court is holding its sessions at the Court room, and has no bearing upon the present case.

Nov. Term,
1851.

THE NORTH-
ERN INDIANA
RAILROAD
COMPANY
V.
THE MICHIGAN CENTRAL
RAILROAD
COMPANY.

NOV. TERM,
1851.

THE NORTH-
ERN INDIANA
RAILROAD
COMPANY

V.
THE MICHIGAN
CENTRAL
RAILROAD
COMPANY.

The third and last argument urged by the counsel for the appellees in support of their motion was, that the statute does not authorize an appeal to be taken from the judgment of a judge, rendered in vacation, until the next term of the Circuit Court, and this appeal, having been taken immediately upon the rendition of the judgment, is void; wherefore the order granting a *supersedeas* is also void, this Court having no jurisdiction of the case. It was contended that it is the duty of the Court or judge, when examining a record presented to obtain a *supersedeas*, to see that the case is one that comes within the jurisdiction of the Supreme Court, and if it does not, a *supersedeas* ought not to be granted.

My understanding of the object of the statute in requiring an application for a *supersedeas* to be made in such cases, is, that the Court or judge may be satisfied before the further proceedings in the Court below shall be delayed, that the errors assigned are not frivolous, but present some question that may be worthy of investigation. A *supersedeas* is never denied unless it appears, plainly and palpably, that the questions raised are immaterial, or that they have been heretofore finally settled, or that the cause has been brought up merely for delay. When the application is made to a single judge, it is not the usual practice to consult with the other judges upon the propriety of granting it, unless the alleged errors appear so palpably untenable that the judge to whom the application is made, thinks, at first sight, that a *supersedeas* ought to be refused. In that case, the other judges are usually consulted, lest by the hasty decision of one member of the Court, the plaintiff in error might be improperly deprived of his rights. If the *supersedeas* is granted, the interests of the opposite party are protected by the bond required to be filed, and his judgment, if it be a correct one, is only temporarily delayed; but by the refusal to grant a *supersedeas*, the plaintiff in error, if the judgment should be in fact erroneous, may be deprived of the remedy which the law contemplates he should have, and for the want of which he might be irreparably injured.

Hence it is deemed necessary to be more careful and cautious in the refusal than in the granting of a *supersedeas*.

It not unfrequently happens that, in addition to the questions raised upon the proceedings of the inferior Court, there are others relative to the jurisdiction of this Court, and these are often of a most difficult and delicate character. I think that these questions of jurisdiction should be viewed like any others, and if there is a clear and palpable want of jurisdiction, we should be authorized to refuse a *supersedeas*, but if there should be any doubt on that subject the consideration of it must necessarily be deferred until the parties can be heard and deliberate decision be made by the Court. It could not have been the intention of the legislature that decisions of such difficulty and importance as these would often be, should be made in an off-hand manner by a single judge.

There has been no instance, within my knowledge, of an order granting a *supersedeas* having been set aside upon the ground of a want of jurisdiction of the cause. Motions to dismiss an appeal or writ of error for want of jurisdiction, have been common. The want of jurisdiction may be urged either upon such a motion or upon the final hearing of the cause, but, according to our practice, the question, in either case, must be submitted when the parties are regularly in Court, or by consent; it being one upon which both parties are considered entitled to be heard.

In the present case it is not denied that the questions involved in the controversy between the parties are important. That relating to the jurisdiction of this Court, is also one of considerable importance, in various points of view, and, to my apprehension, it is not so clear that no valid appeal was taken, that I should consider myself at liberty to refuse a *supersedeas* on that ground. The granting of a *supersedeas* is not, however, in any case, to be considered as an intimation of an opinion upon the questions presented by the record. If it intimates anything it is only that they are of sufficient importance to merit a

Nov. Term,
1851.

THE NORTH-
ERN INDIANA
RAILROAD
COMPANY
v.
THE MICHIGAN
CENTRAL
RAILROAD
COMPANY.

Nov. Term,
1851.

PRUITT
v.
MILLER.

hearing of the parties and the consideration of the Court, and nothing more is now intended to be said or intimated, as to any of the questions presented by this case.

PRUITT v. MILLER.

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A reward was offered, by *Franklin* county, for the apprehension and delivery to the sheriff of said county, of one *E.*, who was charged with the crime of murder. One *M.* thereupon went to *New Orleans* in pursuit of *E.*, and arrested him and brought him back to the vicinity of said county. Here, by the negligence of *M.*, *E.* escaped. On the morning afterwards, *M.*, with others in his employ, watched a house where *E.* was supposed to be secreted, but did not find him. On the next morning, *M.* called on one *P.*, related to him the circumstances of his journey, his expenses, the arrest of *E.* and his escape, and requested the aid of *P.* to re-take *E.*, and promised *P.* to compensate him if he, *P.*, should arrest him. *P.* agreed to watch at said house for *E.*, take him if he should come there, and give *M.* notice of the arrest. *P.* said *M.* ought to have the reward. Meanwhile, *M.* continued his search for *E.* in the vicinity. *P.* arrested *E.* at said house, on the day after the conversation with *M.*, concealed from *M.* the fact, delivered *E.* to the sheriff of said county, and obtained the reward. In *assumpsit* by *M.* against *P.* to recover the reward, *held*, that *P.* was merely the servant of *M.* to make the arrest, and that the latter was entitled to the reward. *Held*, also, that no demand of the reward from *P.* was necessary before suit.

No plea of set-off, or notice of set-off, was filed in this cause. *Held*, that it would not have been competent, therefore, for the jury to have allowed *P.* compensation for making the arrest.

An opinion expressed by a witness, inconsistent with facts testified to by him, cannot be given in evidence to impeach his testimony.

A party employed merely to aid in making an arrest, has no implied authority to engage others, at his employer's expense, to assist.

A conviction of petit larceny does not render a person incompetent as a witness.

Monday,
November 24.

APPEAL from the *Franklin* Circuit Court.

PERKINS, J.—*Assumpsit* by *Russell Miller* against *William Pruitt* on a count for money had and received, &c. Plea, non *assumpsit*. Jury trial; verdict and judgment for the plaintiff, and new trial refused.

The facts of the case are substantially these: A reward of 200 dollars was offered, in *December*, 1850, by the county of *Franklin*, in this state, for the apprehension and delivery to the sheriff of said county of *Joseph Emsweller*, who was charged with the murder of *Chauncey Jenks*. *Russell Miller* thereupon went to *New Orleans* in pursuit of *Emsweller*, succeeded in arresting and bringing him on the way to *Franklin* county, as far as *Harrison*, a town near the eastern boundary of said county, and between it and *Cincinnati*, at which place, on *Thursday* night, *Emsweller*, through the carelessness of *Miller*, made his escape. *Friday* morning *Miller* came on to *Franklin* county, seeking aid to re-arrest him. *Emsweller's* wife lived with *Mrs. Stuttle*, on the farm of the defendant, *Pruitt*. *Miller*, with others whom he had procured to aid him, watched *Mrs. Stuttle's* house *Friday* night. *Emsweller* did not appear. On *Saturday* morning *Miller* called on *Pruitt*, related to him the circumstances of his journey to and from *New Orleans*, his heavy expenses, his arrest of *Emsweller*, the escape, &c., and solicited his aid in re-taking him. He told *Pruitt* if he would arrest *Emsweller* and let him, *Miller*, know, he would pay him well for it, and furnished him a pistol for safety. *Pruitt* agreed to watch for *Emsweller* at *Stuttle's*, take him if he should come there, and let *Miller* know. He said *Miller* ought to have the reward. In the meantime, *Miller* continued his search in the vicinity. *Emsweller* came to *Stuttle's* *Saturday* night, and, on *Sunday* morning, *Pruitt* arrested him there, but instead of informing *Miller* of the fact, he delivered *Emsweller* to the sheriff and claimed and received the reward of 200 dollars. This is a suit by *Miller* to recover that money from *Pruitt*.

It is contended, in behalf of *Pruitt*, that he arrested *Emsweller* on his own account, and delivered him to the sheriff, and thus became entitled to the reward offered, as his own property. But we think it plain enough that *Pruitt* made the arrest at the request and as the servant of *Miller*, and is entitled, not to the reward, but to a reasonable compensation for that service. *Miller* had ar-

Nov. Term,
1851.

PRUITT
v.
MILLER.

Nov. Term,
1851.

PRUITT
v.
MILLER.

rested *Emsweller* and brought him far on the way to the place where he was to be delivered up; had somewhat carelessly perhaps, but not intentionally, suffered him to escape, and was following him in eager pursuit; gave *Pruitt*, who was not attempting, and, so far as appears, was not intending to attempt, the arrest on his own account, information how and where *Emsweller* had escaped and where he would be likely to be found; and obtained his promise that he would make the arrest at the place named, not elsewhere, on a promise of being paid for so doing. Had *Pruitt*, when applied to by *Miller*, declined to act in his behalf, *Miller* might, and probably would, have watched at *Stuttle's* and arrested *Emsweller* himself. But, relying on *Pruitt's* promise, he trusted that point to him, and it would certainly be against all equity, under the circumstances, now to suffer *Pruitt* to repudiate his promise and claim the arrest as made on his own account.

In the second place, it is claimed that if *Pruitt* was the servant or agent of *Miller* in making the arrest, then, before this suit could be instituted, it was necessary that there should be a demand by *Miller* on *Pruitt* for an accounting and an allowance, or an offer of an allowance, to him, out of the 200 dollars he had received, for his trouble, expenses, &c.

It is in general true that where an agent receives money belonging to his principal in the course of his agency, he is entitled to an accounting before he can be sued for the money, and may retain his expenses, &c. *English v. Devarro*, 5 Blackf. 588.—See Story on Agency, s. 350. But in this case, we think *Pruitt* did not receive this reward in the course of his agency for *Miller*, but rather as a wrong-doer. He was not employed to take *Emsweller* to *Brookville* and receive this money on his surrender to the sheriff; but only to arrest and detain him for *Miller*. If a man is employed simply to find a horse that is lost and bring him to the owner, and he find the horse, but instead of returning him to the owner, take him to the person to whom the owner may have sold him, and receive

the price, it would hardly be contended that he received that money in the course of his agency for the owner. It would be otherwise, were he furnished with the horse to sell. And as to the compensation to which *Pruitt* may be entitled for arresting *Emsweller*, it could not have been allowed by the jury in this case, had any amount been proved, which there was not, because there was no plea or notice of set-off filed.

Nov. Term,
1851.

PRUITT
v.
MILLER.

We may remark here that a demand of the 200 dollars was made before suit brought. A bill of exceptions states that *James Hawthorn*, a witness for the plaintiff, testified that he went with *Miller* to the house of *Pruitt*, in *January*, then last, after they had been hunting *Emsweller*, and that *Miller* wished *Pruitt* to aid him in arresting said *Emsweller*; that the witness was then proceeding to state to the jury what *Miller* said to *Pruitt* at the time, relative to the arrest of *Emsweller* in *New Orleans*, his subsequent escape, &c., whereupon the defendant, *Pruitt*, objected to the witness making such statement, but the Court overruled the objection.

That conversation was a part of the *res gestæ* and properly given in evidence.

The witness then detailed the conversation, and "proceeded further to say that *Pruitt* consented to arrest *Emsweller* if he could, and then to let *Miller* know of the arrest; that he said he would do right about the reward, that *Miller* ought to have it, &c.; whereupon the defendant, for the purpose of impeaching the witness, proposed to ask him if he had not, after that conversation, on the same day it occurred, told one *Thomas Guard* that *Emsweller* was at large, that whoever caught him would be entitled to the reward, and that *Miller* was no more entitled to it than any other person;" but the Court refused to permit the question to be asked. We think there was no error in this. The question was irrelevant. The witness had not testified to anything in regard to his own opinion. He had stated that a certain conversation took place between *Miller* and *Pruitt*. Now, the question proposed to be asked was, not whether he had told some

Nov. Term,
1851.

PRUITT
v.
MILLER.

person that no such conversation did take place, but whether, admitting the conversation to have taken place, he had not, in fact, given his opinion as to the legal question involved in the case. This was a matter wholly unimportant.

The bill of exceptions further states that the defendant offered to prove, by a competent witness, that he, *Pruitt*, after *Miller* had applied to him to arrest *Emsweller*, agreed with Mrs. *Emsweller* to give her 100 dollars and to *Emsweller* himself, 50 dollars of the reward, if she would let him know when *Emsweller* came home; but the Court would not permit the proof to be made.

This ruling could have done no harm. *Pruitt* had no authority to bind *Miller* by such a contract, even if he could bind himself, which we do not decide; but if he had had such authority, it was not pretended that *Pruitt* had paid the money, and hence it should not have been deducted in this suit. If *Miller* was bound by *Pruitt's* bargain to pay the money, the *Emswellers* might, and perhaps would, look directly to him for it.

Emsweller himself was made a witness by the defendant. The plaintiff objected to him as incompetent, because, in 1848, he had been convicted of petit larceny. This, however, is not a crime that renders a person, in law, infamous, and hence, does not render him incompetent as a witness. R. S. p. 999, s. 79, and p. 719, s. 261.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

G. Holland, for the appellant.

J. D. Howland, for the appellee.

BUSH v. THE PERU BRIDGE COMPANY.

Nov. Term,
1851.BUSH
v.
PERU BRIDGE
COMPANY.

The right to establish public ferries resides in the legislature; and the extent of the ferry-right conferred depends upon the terms of the legislative grant.

A simple grant of a right to establish a public ferry will not be construed to be exclusive, but subject to such future grants as the public convenience may require.

The R. S., 1838, do not confer upon the first grantee of a ferry-privilege, the exclusive right to maintain a ferry at the point where the same may be established, but reserve the right to establish bridges or other ferries at the same point, when the public convenience shall require them.

The circumstance that the boards of commissioners of the several counties have authority, by law, to establish ferries, does not affect the right of the legislature to exercise that power.

An irregularity in the proceeding of the defendants in executing the writ of *ad quod damnum* authorized by their charter could only be taken advantage of by the owners of the soil appropriated by the defendants.

APPEAL from the *Miami* Circuit Court.Monday,
November 24.

PERKINS, J.—This was a bill in chancery by *John Bush* against the *Peru Bridge Company*, praying a perpetual injunction restraining said company from the use of their bridge, and also praying an account of receipts, &c. Bill dismissed in the Court below.

The facts material to the decision of the cause are as follows: In 1835, *Hood, Britton, and Williams*, proprietors of the town of *Peru, Miami county, Indiana*, established, under a license from the county commissioners, a public ferry “across the *Wabash* river at *Broadway* street in” said town. That ferry passed, by successive sales and purchases, through divers hands, and, finally, prior to 1842, into those of *Bush*, the plaintiff. In 1842, the legislature incorporated the *Peru Bridge Company*, by a charter containing this section:

“Sec. 6. The said corporation may erect a bridge across the *Wabash* river, at the southern termination of *Broadway* street, in the town of *Peru*, in the county of *Miami*; and the said corporation shall have, and may use, the writ of *ad quod damnum*, and all the benefits arising from the law allowing such writ, for the purpose of having condemned the necessary quantity of ground

Nov. Term,
1851.

BUSH
v.
PERU BRIDGE
COMPANY.

for the erection of the abutments, toll-house, and necessary causeways." The bridge, by another section, was to be not less than 25 feet wide. L. L. of 1842, p. 46.

Said *Broadway* street, being 100 feet wide, was sufficient to accommodate both the bridge and the ferry, at its southern termination, and the particular location in it of the one or the other, does not appear to have been designated by the authorizing power.

The erection of the bridge was commenced in the summer of 1843, and completed in *June*, 1844. *Bush*, having somewhat changed one, perhaps both, of his landings, to avoid interference with the bridge, continued his ferry in operation till the 27th of *May*, 1844, at which time he took off his boat and removed it to a ferry lower down the river, never after using the ferry at *Peru*.

In *June*, 1847, he filed this bill, and he seeks to sustain it upon this principle, viz., that the grant of the ferry-right to *Hood*, *Britton*, and *Williams*, (which right is now held by the plaintiff by assignment,) conveyed the exclusive privilege of transportation across the *Wabash* at *Peru*; that the *Peru* bridge is a disturbance of that privilege, and, hence, a nuisance subject to abatement.

Waiving the question whether the remedy, if one exists, should be sought in chancery or at law, we will first examine whether a wrong has been committed that can be remedied in any Court. The right of establishing public ferries is in the legislature; and the extent of ferry-right held by any individual or company, under the legislature, depends upon the terms of the grant made to the one or the other. Had the legislature made a simple, unrestricted grant of the right of a public ferry at *Peru*, to *Hood*, *Britton*, and *Williams*, that right would not have been construed to be exclusive, but to have been conferred subject to such further grants to other persons of right of transportation across the *Wabash* river at that place, as public convenience might require. This point is fully discussed, and, as we think, rightly decided, in the case of *Charles River Bridge v. The Warren Bridge*, 11 Peters, 420.—S. C., 7 Pick. 344. (1.) The ferry at *Peru* was estab-

lished under the following statutory provision, approved *Nov. Term, February 10, 1831. R. S. 1838, p. 302.* 1851.

"Be it enacted," &c., "that the several boards doing county business shall be, and they are hereby, empowered to establish public ferries across those rivers or creeks bounding or within their respective counties, whenever they shall deem it necessary, on due application to them made; but no such ferry shall be established, unless the person making such application be the proprietor of the land on that side of such river or creek on which he wishes to have such ferry established; or when the owner or holder of any land, where the public convenience may require that a ferry should be kept, shall neglect or refuse to have a public ferry established within a reasonable time: *Provided*, That no ferry shall be established within one mile immediately below or above a regularly established ferry, unless they shall deem it important for the public convenience, or where the situation of a town or village, the crossing of a public highway, or the intervention of some creek or ravine should render it necessary."

BUSH
V.
PERU BRIDGE
COMPANY.

This statute expresses the grant of the ferry-right in question, and there is nothing in it conferring an exclusive privilege; but, on the contrary, it contains a clear reservation of the right to establish additional ferries, should the public convenience demand them, at *Peru*. True, the county commissioners are permitted to exercise this right; but the state is not thereby precluded from exercising it directly, instead of by agents, when she may see fit. It was competent for the legislature to determine when the public convenience required additional facilities for crossing the *Wabash* river at the point in question.

Had, then, an additional ferry, or additional ferries, been established there, instead of a bridge, the act, or acts, would have been within the provisions of the contract, if contract it was, with *Hood, Britton, and Williams*, at the grant of the ferry-right to them. We do not see that the establishment of a bridge, instead of a ferry, alters the case. Both are within the reason and spirit of the reser-

Nov. Term,
1851.

BUSH
v.
PERU BRIDGE
COMPANY.

vation. Both are but different means for the accomplishment of the same end, the accommodation of the public—the right of providing for which the state had reserved to herself. The complaint in the case, indeed, is not put upon the ground that a bridge has been authorized instead of a ferry; but upon the ground that no way, of any kind, for crossing the *Wabash* river at *Peru*, in competition with the ferry of *Bush*, could be established. This ground, as we have seen, cannot be maintained. Had, in fact, the grant of the ferry-privilege been exclusive, we incline to the opinion that it should still have been held to be subject to the right of the state, at a future time, when the increasing business and growing wants of the community might require, to authorize a *bridge* in lieu of it. But we need not now go that length.

It is objected that the proceedings by the bridge company, upon the writ of *ad quod damnum*, were irregular; but if they were so, the matter is between the owners of the soil appropriated and the company appropriating it.

Per Curiam.—The decree is affirmed with costs.

D. D. Pratt, A. A. Cole, and I. Hartman, for the appellant.

(1) The case cited in the text was as follows: In 1650, the legislature of *Massachusetts* granted to *Harvard College* the liberty and power to dispose of a ferry by lease or otherwise, from *Charlestown* to *Boston*, passing over *Charles* river. The right to set up a ferry between these places had been given by the governor, under the authority of the Court of Assistance, by an order dated *November 9, 1636*, to a particular individual; and was afterwards leased successively to others, they having the privilege of taking tolls regulated in the grant; and when, in 1650, the franchise of this ferry was granted to the college, the rights of the lessors in the same had expired. Under the grant, the college continued to hold the ferry by its lessees, and receive the profits therefrom, until 1785, when the legislature of *Massachusetts* incorporated a company to build a bridge over *Charles* river, where the ferry stood, granting them tolls; the company to pay to *Harvard College* two hundred pounds a year, during the charter, for forty years, which was afterwards extended to seventy years; after which the bridge was to become the property of the commonwealth. The bridge was built under this charter, and the corporation received the tolls allowed by law; always keeping the bridge in order, and performing all that was enjoined on them to do. In 1828, the legislature of *Massachusetts* incorporated another company for the erection of another bridge, the *Warren*

bridge, over *Charles* river, from *Charlestown* to *Boston*, allowing the company to take tolls; commencing in *Charlestown*, near where the *Charles* river bridge commenced, and terminating in *Boston*, about eight hundred feet from the termination of the *Charles* river bridge. The bridge was to become free after a few years, and, at the time of the announcement of the opinion of the Supreme Court of the *United States*, had actually become free. Travelers, who had formerly passed over the *Charles* river bridge from *Charlestown* square, then passed over *Warren* bridge; and thus the *Charles* river bridge company were deprived of the tolls which they otherwise would have received. The value of the franchise granted by the act of 1785, was thus entirely destroyed. The proprietors of the *Charles* river bridge filed a bill in the Supreme Judicial Court of *Massachusetts*, against the proprietors of the *Warren* bridge, first for an injunction to prevent the erection of the bridge, and afterwards for general relief; stating that the act of the legislature of *Massachusetts*, authorizing the building of the *Warren* bridge, was an act impairing the obligations of a contract, and therefore repugnant to the constitution of the *United States*. The Supreme Court of *Massachusetts* dismissed the bill of the complainants, and the case was brought by writ of error to the Supreme Court of the *United States*, under the provisions of the 25th section of the judiciary act of 1789. The judgment of the Supreme Court of *Massachusetts*, dismissing the bill of the plaintiffs in error, was affirmed.

Mr. C. J. Taney, in delivering the opinion of the Court, used the following language in relation to public grants:

"The rule of construction in such cases is well settled, both in *England*, and by the decisions of our own tribunals. In 2 Barn. & Adol. 793, in the case of the *Proprietors of the Stourbridge Canal* against *Wheely* and others, the Court say: 'the canal having been made under an act of parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction, in all such cases, is now fully established to be this: that any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act.' And the doctrine thus laid down, is abundantly sustained by the authorities referred to in this decision. * * * The object and end of all government, is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished; * * * and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce, and the purposes of travel, shall not be con-

Nov. Term,
1851.

BUSH
V.
PERU BRIDGE
COMPANY.

Nov. Term, 1851. strued to have been surrendered or diminished by the state, unless it shall appear by plain words that it was intended to be done."

HOLLIDAY
v.
COE.

See, also, *The Proprietors of the Piscataqua Bridge v. The New Hampshire Bridge*, 7 New Hampshire, 35; *Backus v. Lebanon*, 11 id. 19; *The Enfield Toll Bridge Company v. The Hartford and New Haven Railroad Company*, 17 Conn. 40 and 454; *Armington v. Burnet*, 15 Vermont, 745; *The White River Turnpike Company v. The Vermont Central Railroad Company*, 21 id. 590; *The West River Bridge Company v. Dix*, 6 Howard, S. C., 507.

HOLLIDAY v. COE.

A., the owner of a flat-boat, undertook with B., for a certain sum, to transport, from *Covington, Indiana*, to *New Orleans, Louisiana*, 3,771 bushels of corn to be delivered at the latter place, without delay, to C. or his assigns, in like good order as at the place of shipment, the unavoidable dangers of the river navigation or fire excepted. In pursuance of his undertaking, A. proceeded on the voyage with his boat and said cargo, until the boat, when within about 250 miles of *New Orleans*, sunk, and the whole cargo was lost. Held, that A. could not recover the freight, or any part of it.

Monday,
November 24.

ERROR to the *Fountain* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by *Coe* against *Holliday*. Plea, the general issue. The cause was submitted to a jury. Verdict for the plaintiff for 222 dollars. Motion for a new trial overruled, and judgment on the verdict.

The declaration, originally, contained six counts. Two of them were adjudged, on general demurrer, to be bad, and need be no further noticed. The remaining counts are general ones for work and labor, and for money paid.

The facts are as follows:

In 1846, the plaintiff, *Coe*, undertook to transport, for *Holliday*, the defendant, a certain quantity of corn from *Fountain* county, in this state, to *New Orleans*, in *Louisiana*. The following bill of lading shows the contract between the parties:

"*Covington, Fountain* county, *Ia.*, May 15th, 1846.

Shipped by *Daniel T. Holliday*, in good order and condition, on board the good flat-boat called the *Queen-City*, No. 3, whereof *Milburn Coe* is owner, and *Samuel Welch* is pilot, for the present voyage, now lying in the port of *Covington* and bound for *New Orleans*, the following property marked and consigned as below, which is to be delivered without delay, in like good order, at the port aforesaid, the unavoidable dangers of the river navigation or fire excepted, unto *M. R. or A. S. Holliday*, or to his or their assigns, he or they paying freight for the said property at the rate of sixteen cents per bushel.

Nov. Term,
1851.

HOLLIDAY
v.
COE.

"In witness whereof, the owner of said boat has affirmed to three bills of lading of this tenor and date, one of which being accomplished, the others to stand void.

"On account of *D. T. Holliday, Covington, Ia.* Property, 3,771 bushels of corn in the ear, at 16 cents, 603 dollars and 36 cents. Consignees, *M. R. or A. S. Holliday*.

"Received on the above ft. of *D. T. Holliday*, 75 dollars and 64 cents. (Bal.) 527 dollars and 72 cents. (Signed) *Milburn Coe.*"

The defendant's advance of 75 dollars and 64 cents, mentioned above, was to pay incidental expenses, such as the expense of a protest, should one be necessary. The defendant had the corn insured at 20 cents a bushel.

The plaintiff, in pursuance of his contract contained in the bill of lading, proceeded on the voyage with his boat and the aforesaid cargo, until the boat, when within about 250 miles of *New Orleans*, sunk, and the whole cargo was lost. Immediately after the loss, the plaintiff went to *New Orleans*, and procured, at an expense of about fifteen dollars, a protest of the boat. Afterwards, the defendant told one of the witnesses he would pay the plaintiff a part of the freight, but the plaintiff was not then present, nor did the witness understand the defendant as contracting to make such payment. The insurance on the corn was paid by the insurers.

These facts do not, in our opinion, support the verdict for the plaintiff. The claim of the plaintiff, under the counts for work and labor, is for freight in transporting the corn

Nov. Term,
1851.

HOLLIDAY
v.
COE.

under the contract between the parties, as evidenced by the bill of lading. But it is very clear that the plaintiff has no ground for the recovery of freight. The answer to his claim for freight is, that the corn was not delivered by him at *New Orleans*; his delivery of it there being a precedent condition to be performed by him. The sinking of the boat and consequent loss of the cargo, before the arrival at the place of destination, show that no freight is recoverable in this case. The circumstance that the plaintiff performed a part of the voyage, and that the loss occurred without any fault on his part, does not authorize the verdict. There are no doubt cases where freight must be paid, *pro rata itineris*. Those cases are where the vessel has performed the whole voyage, and brought only a part of her cargo to the place of destination; or where the vessel has not performed her whole voyage, and the goods have been delivered to the merchant at a place short of the place of delivery. The case before us does not come within either of those classes. Here was an entire loss of the cargo where the boat was sunk, and, of course, the case is not one where freight can be recovered according to the proportion of the voyage performed. 3 Kent's Comm. 219, 227.

There was no evidence to support the count for money paid. It is true that the plaintiff paid a small sum for the protest at *New Orleans*, but the evidence shows that he was bound to pay that out of the money which had been advanced to him, on the freight, by the defendant.

The evidence of the defendant's statement after the loss, that he would pay part of the freight, was made to a stranger, in the plaintiff's absence, and the defendant was not understood as contracting to make such payment. That evidence does not support this suit.

Per Curiam.—The judgment is reversed and the verdict set aside with costs. Cause remanded, &c.

Z. Baird, for the plaintiff.

VICKERS v. CANNON.

Nov. Term,
1851.VICKERS
v.
CANNON.

The admission of illegal evidence, or the giving of erroneous instructions to the jury, cannot be assigned for error, unless such evidence or instructions are shown by a bill of exceptions.

ERROR to the *Allen* Circuit Court.Monday,
November 24.

BLACKFORD, J.—*Cannon* commenced this suit against *Vickers*, before a justice of the peace. The justice gave judgment for the defendant, and the plaintiff appealed to the Circuit Court. Verdict and judgment in the Circuit Court for the plaintiff. There is a paper, in the form of a bill of exceptions, copied by the clerk in the transcript, but the bill is not signed by the judges.

A rule was granted by this Court upon the judges of the Circuit Court, to show cause why they had not signed the bill of exceptions. To that rule, the judges returned that the bill was not true. No further steps have been taken with respect to the bill of exceptions; and the cause has been submitted to the Court.

The errors assigned are, that the Court admitted illegal evidence on the trial, and gave erroneous instructions to the jury.

There being no bill of exceptions, there is nothing in the transcript to which the assignment of errors is applicable.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

D. H. Colerick and *J. G. Walpole*, for the plaintiff.

R. Brackenridge, Jr., for the defendant.

Nov. Term,
1851.

McJUNKIN
v.
McJUNKIN.

McJUNKIN v. McJUNKIN.

Sections 98 and 99, of chapter 46, of the R. S. of 1843, in relation to opening decrees, do not apply to suits for a divorce.

Tuesday,
November 25.

3	30
139	40

APPEAL from the *Allen* Circuit Court.

SMITH, J.—*Alexander McJunkin*, the appellee, filed a bill to obtain a divorce against *Elizabeth McJunkin*. Notice was given by publication, the said *Elizabeth* being a non-resident.

Elizabeth was defaulted, proof was made, and a divorce was decreed in *October*, 1845. At the next ensuing term of the Circuit Court, in *February*, 1846, the said *Elizabeth* filed an affidavit that she had no actual notice or personal knowledge of any kind, of the pendency of the bill for a divorce, and prayed for an opening of the decree. She also filed an answer to the bill.

Notice of the motion to open the decree was given to the complainant, who filed an affidavit, stating that since the decree he had married again. He also denied the allegations in the answer.

The Circuit Court refused to open the decree; and from this decision, *Elizabeth* appeals.

By section 45, c. 35, p. 602, of the R. S., it is provided that the practice and proceedings in suits to obtain divorce shall be the same as in other cases in chancery, with certain specified exceptions.

In the chapter relating to suits and proceedings in chancery, c. 46, ss. 98 and 99, there are provisions that parties against whom a decree has been rendered without other notice than by publication in a newspaper, may, at any time within five years, have such decree opened and be let in to a hearing, by giving notice to the original complainant, or his heirs, devisees, executors, or administrators, and upon filing a full answer to the original bill with an affidavit, &c.

The Circuit Court decided that these last mentioned statutory provisions were not intended to apply to divorce cases; and we are of the same opinion. The fact that

they require decrees to be opened as against the heirs, devisees, or personal representatives of the original complainant, tends to satisfy us that the legislature, in making this enactment, had in view other classes of cases. Among the exceptions to the provision that the practice in suits to obtain a divorce shall be the same as in other chancery cases, one is, that the defendant is not required to make a full answer, but may make a general denial without oath. This, also, would seem to indicate that such suits were not supposed to be within the meaning of the sections referred to in the 46th chapter. The rights of *bona fide* purchasers of property, sold under the decree sought to be opened, are protected by another section, but no provision is made that children born of a second marriage, before the opening of the decree, shall be legitimate; and upon the whole, taking all the provisions of both chapters, and the consequences which would follow a different decision, into consideration, we think the judgment of the Circuit Court should be affirmed.

Per Curiam.—The judgment is affirmed with costs.

R. Brackenridge, Jr., for the appellant.

J. K. Edgerton and C. Case, for the appellee.

Nov. Term,
1851.

MUSGRAVE
V.
GLASGOW.

MUSGRAVE and Another v. GLASGOW.

In an action against principal and surety upon a promissory note, evidence was adduced by the defendant, tending to show that, at the time appointed for the payment of the note, the principal offered to pay the same, and that the payee, without receiving the money or surrendering the note, made an oral agreement with the principal for a new loan of the money, upon the sole responsibility of the latter; but the Court instructed the jury that the evidence constituted no defense to the action. *Held*, that the instruction of the Court was erroneous.

APPEAL from the *Dearborn* Circuit Court.

SMITH, J.—Debt upon two joint and several notes for

Tuesday,
November 25.

Nov. Term,
1851.

MUSGRAVE
v.
GLASGOW.

the payment of 100 dollars each, made by *Musgrave* and *Bond* in favor of *Glasgow*. Judgment for the plaintiff for the amount of the notes.

Musgrave let judgment go against him by default. *Bond* appeared and pleaded the general issue, and several special pleas. Demurrers were sustained to all the special pleas, but as it is agreed by both parties that the evidence applicable under the special pleas might have been, and was, given under the general issue, it is unnecessary to notice them.

The facts relied upon as a defense by *Bond*, were as follows:

Bond was the security of *Musgrave* on the notes sued upon. The notes were drawn payable one day after date, but it was understood that *Musgrave* was to have the money for a trip down the river, and there was a verbal agreement that the latter was to pay 10 *per cent.* interest for the use of it. *Musgrave* came back from his trip down the river, in May, 1848; he then went to *Glasgow* with money to pay the two notes now sued upon, and another note for 100 dollars which *Glasgow* held and upon which *Bond* was not a party. He told *Glasgow* he was ready to pay, and offered to pay, all the notes, but *Glasgow* told him he then wanted only 100 dollars, and that he wished him to keep the rest, as he desired it to be drawing interest. *Musgrave* told *Glasgow* he would have no use for the money unless he could keep it until the next spring, and if he, *Glasgow*, would need the money before the next spring, he had better take it then. *Glasgow* then agreed that *Musgrave* should keep it until the next spring, the latter agreeing to pay 10 *per cent.* interest for it. At the time of this agreement, *Glasgow* asked *Musgrave* if *Bond* would be willing to stand as security for the money again, and *Musgrave* answered that *Bond* had told him, *Musgrave*, he did not want to do so. *Glasgow* then said to *Musgrave*, "it will make no difference, I think you are good for it." *Musgrave* then paid *Glasgow* 100 dollars, and took up the note signed by him for that amount, and

brought away the money he had carried to *Glasgow* to pay the notes upon which *Bond* was security, leaving those notes in *Glasgow's* possession.

Two witnesses testified that, after this transaction, *Glasgow* had inquired of them as to the standing of *Musgrave*, telling them that he had loaned *Musgrave* money, with *Bond* as his security, and had afterwards let *Musgrave* have the money again for another trip down the river, taking *Musgrave* alone for it.

The Court instructed the jury, substantially, that this evidence did not constitute any "defense to the suit, and was not admissible under the general issue."

We think this evidence tended to prove that there was, really, a payment of the original notes and a new loan made to *Musgrave* on his sole responsibility. If *Musgrave* had actually placed the money in the hands of *Glasgow* for the payment of the notes, and afterwards received it back from him as a new loan, under the circumstances detailed, it cannot be doubted that this would have been a payment, and *Bond* would have been discharged. And if the parties intended to waive the formality of passing the money from one to the other and back again, but really to consider the transaction as a payment and new loan, we do not see any good reason why it might not be so regarded by the jury. Viewed in this light, the evidence was admissible and the instructions given were erroneous.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

P. L. Spooner and *E. Dumont*, for the appellants.

J. Ryman, for the appellee.

Nov. Term,
1851.

MUSGRAVE
v.
GLASGOW.

Nov. Term,
1851.

FORKNER and Another v. DINWIDDIE.

FORKNER
v.
DINWIDDIE.

In a suit by *A.* and *B.* before a justice of the peace, the defendant pleaded to the declaration that the suit was brought in the names of *A.* and *B.* for the use and benefit of *A.*, *B.* having no interest therein; that *A.*, before and at the commencement of the suit, and still, was the owner of the note; and that he, the defendant, had fully paid and satisfied the note in this, to-wit, that *A.*, at the commencement of the suit, and still, was justly indebted to him, the defendant, 75 dollars for work and labor, &c. *Held*, that the plea was valid in bar of the action.

Tuesday,
November 25.

ERROR to the *Wayne* Circuit Court.

PERKINS, J.—Suit was commenced in the names of *Euel Forkner* and *Marshall Wright*, before a justice of the peace, upon the following promissory note:

"Four months after date, I promise to pay to the order of *Euel Forkner* and *Marshall Wright*, forty-five dollars, for value received, with six *per cent.* interest after the 25th day of *December* next. *November* 29th, 1848.

David Dinwiddie."

The defendant pleaded as follows:

"That the suit is brought in the names of *Euel Forkner* and *Marshall Wright*, for the use and benefit of *Euel Forkner*, the said *Wright* having no interest therein; and that the said *Forkner* is the only owner of said note, and was, before and at the time of the commencement of this suit. And the defendant further says, that he has fully paid and satisfied said note to the said *Euel Forkner*, in this, to-wit, that the said *Euel Forkner* is, and was, at the commencement of this suit, justly indebted to said defendant, 75 dollars, for work and labor," &c.

There was an appeal from the judgment of the justice of the peace to the Circuit Court. In that Court, the plaintiffs moved that the defendant's plea be set aside, on the ground that it alleged a set-off due from *Forkner* alone; but the Court overruled the motion. This is the error complained of. The set-off was, to some extent, proved and allowed.

In our statute on the subject of set-off, is this provision:

"If the action is brought by one person in trust, or for

the use of another, the defendant may set off any demand against the person for whose use or benefit the action is brought, in like manner as if that person were the plaintiff." R. S. p. 709, sub-section 7.

Nov. Term,
1851.

RUNDLES
v.
JONES.

Had this suit, then, appeared upon the record as *Forkner* and *Wright*, for the use of *Forkner*, against *Dinwiddie*, the set-off would have been admissible. And if the suit be, in truth, for the use of *Forkner* alone, the fact should appear upon the record; and we do not think the omission of the beneficiary plaintiff to have the entry made, should preclude the defendant from pleading and proving the fact and availing himself of the benefit its existence may give him. We do not think the section of the statute should be construed to apply to those cases alone where the use or trust may be disclosed upon the record by the plaintiff or plaintiffs. (1.)

Per Curiam.—The judgment is affirmed with costs.

J. S. Newman and *J. P. Siddall*, for the plaintiffs.

O. P. Morton, for the defendant.

(1) See *Henry v. Scott*, May Term, 1852, *post*.

3	35
128	250
3	35
164	250

RUNDLES and Another, Executors, v. JONES.

The assignment of errors by the executor of a judgment-plaintiff, should contain an averment of the matter which makes the executor privy to the judgment, and establishes his right to sue; otherwise, the assignment will be objectionable on demurrer.

The plea in *nullo est erratum* to the assignment of errors of an executor, admits his representative character.

The authority of an attorney at law determines by the death of his client. Before the rendition of judgment upon the verdict for the plaintiff in *alander*, the defendant moved for a new trial. The Court took the motion under advisement, and continued the cause until the next term. The record of such next term showed that the defendant then came and suggested the death of the plaintiff, since the preceding term of the Court; and that the attorneys of record of the plaintiff also came, and agreed to remit a specified part of the verdict, in consideration of which the defendant agreed that the Court, without a decision of the motion, should

Nov. Term,
1851.

RUNDLES
v.
JONES.

render judgment for the residue of the verdict; which the Court thereupon did. *Held*, that the record did not establish that the plaintiff was dead, when the judgment was rendered.

The facts that errors of law were assigned in the Supreme Court by the executors of the plaintiff below, and that they were pleaded to by the defendant, furnish no evidence that the plaintiff below was dead when the judgment was rendered in the Circuit Court.

Tuesday,
November 25.

ERROR to the *Allen* Circuit Court.

PERKINS, J.—*Matthew P. Montgomery* sued *Joseph Jones* in an action of slander. The cause was tried by a jury, at the *February* term, 1848, upon the general issue, and the plaintiff obtained a verdict of 900 dollars. The defendant interposed a motion for a new trial, the motion was taken under advisement by the Court, and the cause continued to the next succeeding term. Afterwards, at the *October* term, 1848, the record states that the following proceedings were had: "Comes now the said defendant, and suggests the death of the said *Matthew P. Montgomery* since the last term of this Court; and the attorneys of record of the said plaintiff also come, and agree to remit, and hereby do remit, 700 dollars from the amount of the verdict heretofore rendered in this cause; in consideration whereof the said defendant hereby agrees that the Court shall, without a decision of the motion now under the consideration of the Court, render a judgment in this cause against him for 200 dollars, upon this agreement. It is therefore considered by the Court that said plaintiff do have and recover from said defendant the sum of 200 dollars, and his costs and charges," &c. The record of proceedings below here terminates.

On the filing of the transcript in this Court, accompanied by some affidavits, the plaintiffs asked a *mandamus* to the Court below requiring a rendition there of a judgment upon the verdict of the jury, for 900 dollars. A *mandamus* was refused, on the ground that the plaintiffs had other remedy for the wrong, if wrong had been done. The following assignment of errors was then placed upon the transcript:

"*Philemon Rundles*, executor, and *Mary Montgomery*, executrix, of *Matthew P. Montgomery*, deceased, v. *Joseph*

Jones. And the said plaintiffs, by attorney, come and say that in the record, &c., manifest error has intervened, in this, that judgment was rendered by the Circuit Court for 200 dollars, and not for 900 dollars; and in this, that judgment was not rendered as of the preceding term; and they pray an order, on the reversal of the judgment, to the Circuit Court, to render judgment for the 900 dollars. To this assignment the defendant pleaded, "*in nullo est erratum.*"

Nov. Term,
1851.

RUNDLES
v.
JONES.

A question has been made as to whether this assignment of errors is not fatally defective, in not sufficiently averring the death of the plaintiff below, and the representative character of the plaintiffs in error.

A writ of error is regarded as a new suit. Petersdorff, vol. 9, p. 3. It is obtained as a matter of right, in the *English* practice, by the party desiring it filing, with the proper officer, a *præcipe*. Id. 16. "But where the person suing becomes privy to a judgment, *by operation of law*, as an executor or heir, if he would sue, he sues in his *own name*, and by averment spreads on the record the matter which makes him privy to it, and establishes his right to sue." Wright's R. 737. Upon a judgment against a *feme covert* alone, she and her husband must join in the writ of error. 2 Swan Pr. 1141.—R. S. 629. In our practice, the writ is usually dispensed with, and the suit proceeds upon a transcript filed by the plaintiff in error, with an assignment of errors thereon. R. S. 634. This assignment is in the nature of a declaration. 2 Tidd, title, *Error*.—Petersdorff, vol. 9, p. 82. It may be demurred or pleaded to as a declaration. Id. 59. The common plea is, "*in nullo est erratum.*" Swan, *supra*, 1144. "In the case of *Ferrar et al. v. The United States*, 3. Pet. 459, it is said that the decisions of the Court have uniformly been that an appearance cures any defect in the service of process." Conkling, 452. In short, proceedings in error seem to be governed generally by the rules governing other cases. The party might have taken his objection to the assignment in this case by demurrer, but we think it has been waived by plea of no error. The

Nov. Term,
1851.

RUNDLES
v.
JONES.

general issue in a suit by an administrator, admits the representative character of the plaintiff. *Lowe v. Bowman*, 5 Blackf. 410.

We proceed, then, to examine the errors assigned:

If *Montgomery* was alive at the time the attorneys below remitted a part of the verdict, they had power to do that act. But, if he was dead, they had not power to do it. His death was an immediate revocation of the powers of his attorneys. 2 Kent, 646. So, if he was then alive, judgment was properly entered in his favor of that term. But, if he was dead, it should have been entered as of a former term, he being then alive—the term at which the cause was submitted to the Court. Broom's L. Max. 86. This could have been done, as the delay of the Court shall prejudice no man. And if it was made to appear to the Court below, at the time of rendering judgment, that the plaintiff was dead, the entry of judgment in his favor, as at that time, would be an error cognizable in this Court. But if his death was not made to appear to the Court below at the time, while, nevertheless, it had occurred, and judgment was rendered in his name, as of that time, as it was from want of information of fact, and not from mistake of law, and the fact of the death is not, upon our present supposition, disclosed in the record, the error would not be cognizable in this Court, but would properly be rectified in said Court below by a *coram nobis*, as the writ is usually denominated in the Courts of the states of the U. S. 2 Swan Pr. 1161.—1 McLean, 143.—Bouv. Dic., 2 vol., 665.—2 Tidd, 9 Ed., 1136. And see this last reference for the distinction between the writ *coram nobis*, and *coram vobis*. By this proceeding, the question of fact, whether the plaintiff was, or was not, dead at the rendition of judgment, would be tried before the Court that rendered the judgment. In *Pickett's Heirs v. Leggerwood et al.*, 7 Peters, 144, it is said the usual mode adopted at present for the correction of such errors as that alleged by counsel to have occurred in this case, is a motion to the Court in which the error occurred, supported by affidavit, instead

of the writ of error *coram nobis*. Notice, in such case, would, of course, be necessary to the adverse party.

The whole matter for our determination in the case before us, resolves itself, therefore, into this question: Does the transcript show that the plaintiff below was deceased at the time judgment was rendered in his favor? We think it does not. True, it is stated that the defendant made such a suggestion, but it does not appear to have been admitted by the counsel for the opposite party as true, and it was not proved by affidavit or otherwise; nor was it acted upon, for the Court proceeded to enter up judgment in his name as of that time. There is nothing, therefore, disclosed by the record showing that either of the errors assigned have been committed, and the judgment must be affirmed with costs. The facts, that errors of law are assigned in this Court by the executors of *Montgomery*, and that that assignment is pleaded to by the adverse party, are no evidence that said *Montgomery* was dead at the rendition of the judgment below.

Per Curiam.—The judgment is affirmed with costs.

J. B. Howe, for the plaintiffs.

R. Brackenridge, Jr., for the defendant.

Nov. Term,
1851.

HARDESTY
v.
SMITH.

HARDESTY v. SMITH.

Debt by the assignee of sealed notes for the payment of money, against the maker. Pleas—1. That the consideration of the notes was the sale and assignment from one *I.* to the defendant, of the full and exclusive right and liberty of making, constructing, and vending to others to be used, a certain improvement in the lamp, described in a schedule attached to, and forming a part of, said sale and transfer, signed by the pretended inventor, to-wit, one *H.*, for the term of 14 years from the date of the letters patent, to-wit, &c., within the state of, &c., and that said supposed improvement in the lamp, at the time, &c., and still, was of no value whatever. 2. That the only consideration of the notes was the sale and transfer of the right mentioned in the first plea, and that said *I.*, combining with one *W.*, to whom the notes were made payable, falsely and fraudulently represented that said improvement in the lamp, would burn, by one filling with oil, for the space of six hours, whereas, in truth, it would burn for a space of time less than three hours and

3	39
141	366
3	39
148	98

Nov. Term,
1851.

HARDESTY
v.
SMITH.

Tuesday,
November 25.

thirty minutes, and that it would cost but 16 cents to construct one of said lamps, whereas, in truth, it would cost $37\frac{1}{2}$ cents, all which was well known to said I. and W. Held, that the pleas were bad on general demurrer.

ERROR to the *Tippecanoe* Court of Common Pleas.

PERKINS, J.—Debt by *Hardesty* against *Smith*, upon sealed notes for the payment of money. The notes were made payable to *Artemis Wood*, and were by him assigned to one *Isham*, and by said *Isham* to the plaintiff.

The defendant pleaded—1. That the sole consideration of said notes “was the sale and assignment from one *Cyrus Isham*, to the said defendant, of the full and exclusive right and liberty of making, constructing, using, and vending to others to be used, a certain supposed improvement in the lamp, described in a certain schedule attached to, and forming a part of, said sale and transfer, signed by the pretended inventor, to-wit, one *Horace Howard*, for the term of fourteen years, from the date of the letters patent, to-wit, the 10th day of *February*, 1843, within the state of,” &c. ; and the said defendant says that said supposed improvement in the lamp, was, at the time, &c., and still is, of no value whatever.

2. That the only consideration of the notes, was the sale and transfer of the right mentioned in the first plea, and that said *Isham*, “combining with said *Artemis Wood*, to whom the notes were made payable, falsely and fraudulently represented that said improvement in the lamp, would burn, by one filling with oil, for the space of six hours, whereas, in truth, it would burn for a space of time less than three hours and thirty minutes; and that it would cost but 16 cents to construct one of said lamps, whereas, in truth, it would cost $37\frac{1}{2}$ cents; all which was well known to said *Isham* and *Wood*.”

To these pleas, the plaintiff demurred generally. The Court sustained the demurrer to the second plea, overruled that to the first, and the defendant had final judgment in his favor.

The demurrer to the second plea was rightly sustained. Though that plea alleges fraud, still it does not aver that

the right purchased was of no value, and shows no offer to return it to the vendor. The contract has not been rescinded, and the defendant retains an article which, according to the plea, we must regard as of some value. He has no right, therefore, wholly to preclude the plaintiff from his action, though he may, perhaps, avail himself of the fraud, if it exist, in mitigation of damages. See *Johnson v. McLane*, 7 Blackf. 501; and the cases cited in note 2, Chit. on Cont., 7 Am. Ed., p. 463, and note 2, p. 678.

Nov. Term
1851.

HARDENY
v.
SMITH.

The first plea is also bad, and the Court erred in not sustaining the demurrer to it. The simple fact that the improvement in the lamp was of no utility, is not sufficient to bar a suit on these notes. Parties of sufficient mental capacity for the management of their own business, have a right to make their own bargains. The owner of a thing has the right to fix the price at which he will part with it, and a buyer's own judgment ought to be his best guide as to what he should give to obtain it. The consideration agreed upon may indefinitely exceed the value of the thing for which it is promised, and still the bargain stand. The doing of an act by one at the request of another, which may be a detriment or inconvenience, however slight, to the party doing it, or may be a benefit, however slight, to the party at whose request it is performed, is a legal consideration for a promise by such requesting party. So the parting with a right, which one possesses, to another, at his request, may constitute a good consideration. And where one person examines an invention to the use of which another has the exclusive right, and, upon his own judgment, uninfluenced by fraud, or warranty, or mistake of facts, agrees to give a certain sum for the conveyance of that right to him, such conveyance forms a valid consideration for such agreement. The judgment of the purchaser is the best arbiter of whether the thing is of any value, and how great, to him. The chance he may acquire of gain, the power he may obtain of preventing any other person from attempting to introduce the use of the invention in compe-

Nov. Term,
1851.

HARDENSTY
v.
SMITH.

tition with some rival one such purchaser may, at the time, own the right to, or some other motive, may induce him willingly to pay a sum of money, in such case, for that which, in the end, may prove valueless in itself. On the other hand, as we have already said, loss, or trouble, or inconvenience, or expense, on the part of the grantor, or seller, without any profit to the buyer, is a good consideration. So the simple parting with a right which is one's own, and which he has the right to fix a price upon, must be a good consideration for a promise to pay that price. In such cases, the purchaser *gets a something*, and he is estopped by the exercise of his own judgment, uninfluenced by fraud, or warranty, or mistake of facts, at the time, to afterwards say it was not worth to him what he agreed to give.

If there is no title in the seller, then, indeed, the purchaser does not get what he supposes he is buying, and may well say there is no consideration, unless where he purchases under such circumstances as show that he takes the risk of the title. But the doctrine of failure of consideration rests, as a general rule, on the two doctrines of fraud and warranty. Where either of these exists, the party does not purchase upon his own unbiased judgment of the thing, and hence is not estopped as to the price; and hence, again, may show in evidence what, by the judgment of others, the thing purchased is really worth, where it is retained, rather than returned upon a rescission of the contract entirely.

Where, however, there is no fraud, or warranty, express or implied, or mistake as to facts, the parties are bound by the contracts they make. *Pollard v. Lyman*, 1 Day, 156, and *Kernodle v. Hunt*, 4 Blackf. 57, are in point. When a party gets all the consideration he honestly contracted for, he cannot say he gets no consideration, or that it has failed. If this doctrine be not correct, then it is not true that parties are at liberty to make their own contracts. And if, where an article is fairly sold and purchased, for a stipulated consideration, a Court or jury may annul the bargain if they come to the conclusion

the article sold was of no value, then they should be permitted, in every case, where they may conclude the article is worth something, to determine whether it is worth as much as has been promised for it, and, if it is not, to reduce the amount to be paid to that point; thus doing away with all special contracts, and putting all dealing upon the *quantum valebat* and the *quantum meruit*—a doctrine that would, indeed, produce litigation enough.

In what we have said, we take it for granted the contract is earnestly made. If it be a mere matter of jest, as if a person should offer his companion a thousand dollars to pick up a cane he had dropped, and it was done, such a promise would not be enforced, because it would show on its face that it was not intended as a contract. So, we admit, there is a class of undertakings known in law as unconscionable, that are regarded as being fraudulent on their face, and not to be enforced; but the one under consideration does not fall within either of these classes.

As to whether, and, if ever, in what cases, a party may set up mistake of facts to show a want or failure of consideration, need not be, and is not, here decided. No such mistake is alleged to have occurred in this case.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. S. Orth and *E. H. Brackett*, for the plaintiff.

R. C. Gregory, for the defendant.

Nov. Term,
1851.

STATE BANK
OF INDIANA
V.
THE CITY OF
MADISON.

THE STATE BANK OF INDIANA V. THE CITY OF MADISON.

The capital stock of the *State Bank of Indiana*, situate within the limits of the city of *Madison*, is not, nor is any part of it, subject to a tax for city purposes, imposed by the authorities of said city.

APPEAL from the *Jefferson Circuit Court*.

BLACKFORD, J.—The *State Bank of Indiana* filed a bill

Tuesday,
November 25.

Nov. Term,
1851.

STATE BANK
OF INDIANA
v.
THE CITY OF
MADISON.

in chancery, in the *Jefferson* Circuit Court, against the city of *Madison*. The object of the bill was to obtain an injunction, restraining the city from collecting a certain tax which she had assessed for the year 1846, upon certain real estate of the bank, which estate is situate within the limits of the city.

The injunction was granted.

The city afterwards filed an answer to the bill, admitting the assessment of the tax, and the commencement of proceedings for its collection, by the city. She claims in her answer to have the right to assess and collect said tax, under her charter granted in 1837 and its amendment made in 1843.

The following agreed case was made by the parties and filed in the Circuit Court, to-wit:

"State Bank of Indiana v. The City of Madison.

"In this case it is submitted to the Court to decide, whether the city of *Madison*, under her charter and ordinances, can assess and collect a tax for city purposes off of the property of said bank, situate within the corporate limits of said city, as off of property of individuals, the same being and constituting a part of the capital stock of said bank. The charter of said city and of said bank, and the proper ordinances and assessments, and all other facts on either side, necessary to present said question, are admitted. And if the Circuit Court be of opinion that such tax may be assessed and collected, then the bill in this case is to be dismissed at the costs of the complainant; and if not, then the injunction is to be made perpetual, and a decree accordingly at the costs of the defendant. Either party may appeal or prosecute a writ of error to the Supreme Court, as in other cases.—*J. G. Marshall*, for defendant. *M. G. Bright* and *J. Sullivan*, for plaintiff."

"We will further admit anything that is necessary to present the question as to the liability of the said bank to be taxed by the city; and, for that purpose, we admit the adoption of the city charter and amendments, and the agreement of the said bank to accept the 5th and 6th

sections of the act of *February 6th, 1841.*—*J. G. Marshall*, for defendant. *J. Sullivan* and *W. M. Dunn*, for plaintiff."

The Circuit Court dissolved the injunction and dismissed the bill.

The only question presented by this case is, whether the capital stock of the state bank, or of any part of it, situate within the limits of the city of *Madison*, is subject to a tax for city purposes, imposed by the city authorities.

The 15th section of the original charter of the bank, granted on the 20th of *January, 1834*, is as follows: "There shall be deducted from the dividends, and retained in bank each year, the sum of twelve and one-half cents on each share of stock, other than that held by the state; which shall constitute part of the permanent fund to be devoted to purposes of common school education under the direction of the general assembly, and shall be suffered to remain in bank and accumulate until such appropriation by the general assembly; and said tax shall be in lieu of all other taxes and assessments on the stock in said bank. And in case of an *ad valorem* system of taxation being adopted during this charter, the said stock shall be subject to the same ratio of taxation as other capital, not exceeding one *per cent.* including the aforesaid tax, and the said tax shall only be assessed on such portion of the stock as shall have been paid, and on account of which the stockholders shall not be indebted to the state."

An act amendatory of said bank charter, was adopted on the 6th of *February, 1841*. The 5th section of said amendatory act contains, *inter alia*, the following clause, to-wit:

"That hereafter the capital stock of the said bank shall be taxable, in addition to the tax of twelve and one-half cents on each share for education, *only for state purposes*; which tax shall be a *per centum*, in amount in each year equal to the amount of state tax, and to the amount of county tax in the county in which the respective branch may be situated for the year, and shall be paid over by the cashier of each branch to the treasurer of state, and

Nov. Term,
1851.

STATE BANK
OF INDIANA
V.
THE CITY OF
MADISON.

Nov. Term,
1851.

STATE BANK
OF INDIANA

v.

THE CITY OF
MADISON.

by such cashier shall be charged to the stockholders and deducted from the dividends: provided, that the whole amount of the tax herein provided, with said education tax, shall not exceed one *per cent.* on the capital stock."

There is then an express prohibition, in this amendatory act, against taxing the capital stock of the bank for any other than state purposes. The tax now in question is on a part of said capital stock, and is not for a state purpose. The consequence is that the tax is illegal, unless the city of *Madison* is not bound by said prohibition. That city, like all other municipal corporations in our state, is entirely under the control of the legislature. Its charter may be modified or repealed by the legislature, at any time. *The People v. Morris*, 13 Wend. 325.—*Sloan v. The State*, 8 Blackf. 361. The consequence is, that the said prohibition is obligatory on the city of *Madison*, and that the assessment of said tax cannot be sustained.

The principle involved in the case before us, is expressly decided in a late case in *New Jersey*. There was an incorporated company in *New Jersey*, called *The Patterson and Hudson River Railroad Company*. The charter of that company contained a provision saying, that the company, after the expiration of five years, should pay to the treasurer of state, yearly and every year, a tax of one-quarter of one *per cent.* upon their capital stock paid in, and yearly and every year, after the expiration of ten years, a tax of one-half of one *per cent.* upon the capital stock so paid in as aforesaid, and that *no further or other tax or impost* should be levied or assessed upon said company. A city tax in *Jersey City* was assessed upon some real estate of said company situate in that city; and a question was raised in the Supreme Court, whether the company was liable to such tax. The Supreme Court set aside the assessment; and the authorities of *Jersey City* sued out a writ of error. The Court of Errors and Appeals affirmed the judgment of the Supreme Court; holding that the tax paid was not only a bonus for the chartered privileges of the company, but was also a commutation for such property as might necessarily be held for

purposes reasonably incident to the enjoyment of the franchise; and that the company was exempted from all other taxes, whether assessed for state, for city, or for township purposes. *Gardner, Assessor, v. The State*, 1 Zabriskie's R. 557.

Nov. Term,
1851.

BENNETT
v.
BUCHANAN.

We are, therefore, of opinion that the Circuit Court erred in dissolving the injunction and dismissing the bill.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Sullivan, M. G. Bright, and W. M. Dunn, for the appellant.

J. G. Marshall, for the appellee.

BENNETT v. BUCHANAN.

A surety, who has discharged a judgment rendered against him for a debt of his principal, by executing a note not negotiable by the law-merchant, and a mortgage, for the amount of the judgment, cannot sue his principal for money paid until he has paid the note and mortgage, or a part thereof.

ERROR to the *Huntington* Circuit Court.

Tuesday,
November 25.

BLACKFORD, J.—*Buchanan* brought this suit against *Bennett* for the recovery of money alleged to have been paid by the plaintiff as security for the defendant, his principal. The suit was commenced, under the statute, by notice and motion.

The notice, which stands in the place of a declaration, states that, on the 30th of *December*, 1843, the defendant, as principal, and the plaintiff, with others as sureties, executed a joint and several promissory note for the payment, six months after date, of 670 dollars to *Elias Murray* and *Patrick McCarty*, administrators of *Daniel Johnson*, deceased; that, on the 3d of *March*, 1846, the said *Murray* and *McCarty* sued the now plaintiff, *Buchanan*, in the *Huntington* Circuit Court, on the said note, and, on the 17th of *March*, 1846, recovered judgment against him, in the suit, for 782 dollars and 22 cents, with costs; that on

Nov. Term,
1851.

BENNETT
v.
BUCHANAN.

the 18th of *August*, 1849, the now plaintiff fully discharged said judgment to said *Murray*. The notice concludes by saying that, by virtue of the premises, the now defendant, *Bennett*, as the principal debtor, became liable to pay the now plaintiff, *Buchanan*, as his surety, the sum of 942 dollars and 18 cents, that being the amount of said judgment, interest, and costs.

The defendant pleaded the general issue.

The cause was submitted to the Court, and judgment rendered for the plaintiff.

On the trial, the note and judgment described in the notice were proved.

The evidence relative to *Buchanan's* payment of the judgment is as follows :

The following entry on the judgment-docket of the *Huntington* Circuit Court :

"*Elias Murray* and *Patrick McCarty* v. *Joseph Buchanan*. Assumpsit. Date of judgment, *March* 18, 1846. Amount of judgment, \$782.22. Received the amount of the within judgment in full, and the same is hereby discharged. *August* 1st, 1849. *Elias Murray*, adm'r."

The said *Murray* was examined as a witness. He stated that he had signed said receipt, and that said judgment was paid and discharged by *Buchanan* by his giving a promissory note for the sum of 942 dollars signed by him and payable to the witness; that the last mentioned note was amply secured by a mortgage, on real estate, but was still due and unpaid. The witness further stated that said judgment had been in no other way paid or discharged. The plaintiff also proved the amount of costs in the suit in which said judgment was rendered.

There was no other evidence.

The only-question in this cause is, whether or not the evidence supports the action.

The suit is for money paid by a surety for his principal. The evidence of the payment is the plaintiff's discharge of a judgment which had been rendered against him for the debt for which he was surety; the discharge being

procured by means of a note and mortgage as above stated.

Nov. Term,
1851.

BENNETT
v.
BUCHANAN.

There are some cases favorable to the plaintiff's recovery, but the weight of authority is against him. The correct doctrine seems to be, that an action, like the present, for money paid will not lie, without proof of an actual payment of money, or that which is equivalent to such payment. In this case there was no payment of money, nor was there anything equivalent to such payment. There were, to be sure, a note and mortgage given and received in satisfaction of the judgment, but that was not sufficient. Had the plaintiff shown that the note thus given and received was negotiable by the law-merchant, the case would have required more consideration. We have heretofore had a case very similar, in principle, to the present one. There a note, not negotiable by the law-merchant, had been given by the surety to the creditor and received by the latter in satisfaction of the original debt. The surety afterwards, but before payment of said note, sued his principal for money paid, relying on his having thus satisfied the original debt. The Court held that the suit would not lie. The ground of that decision is, that the plaintiff had paid no money, nor done anything equivalent to such payment. *Pitzer v. Harmon*, 8 Blackf. 112. It will be time enough for the plaintiff when he shall have paid his note and mortgage, or, at least, a part thereof, to sue his principal for money paid.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt, for the plaintiff.

R. Brackenridge, Jr., for the defendant.

Nov. Term,
1851.

DOE
v.
KINNEY.

DOE on the Demise of RUSH v. KINNEY and Another.

A testator disposed of his estate by will, as follows: "I, J. R., do make and publish this my last will and testament in manner and form following, that is to say, after all my just debts are paid, I give and bequeath to my wife, *Ann*, a certain grey mare, &c., as also all my real and personal estate during her natural life, provided she should not marry, and, at her death, to be equally divided between my brothers and sisters. But, in case she should marry, then the one-half of my estate to be divided equally between my brothers and sisters, or their heirs; and the other half I bequeath to my said wife," &c. *Held*, that upon her subsequent marriage, she took an estate in fee in the testator's real property.

Where a will is free from ambiguity, and the testator's intention is so manifested that, by giving the language employed by him its ordinary and legal signification, no doubt remains of the quantity or duration of the estate devised, a Court will not inquire into the motives which might have influenced the testator, in order to prove or infer that he meant to devise a different estate.

Tuesday,
November 25.

ERROR to the *Fountain* Circuit Court.

SMITH, J.—Ejectment against the defendants in error for a certain tract of land in *Fountain* county. Judgment for the defendants.

Both parties claimed under the will of *Josiah Rush*, who died in 1835, seized of the premises in controversy. The will is as follows:

"I, *Josiah Rush*," * * * "do make and publish this my last will and testament, in manner and form following, that is to say, after all my just debts are paid, I give and bequeath unto my beloved wife, *Ann Rush*, a certain grey mare that I have lately got of *Joshua Walker*, as also all my real and personal estate, during her natural life, provided she should not marry, and at her death to be equally divided between my brothers and sisters. But, in case she should marry, then, and in that case, the one-half of my estate to be divided equally between my brothers and sisters, (or their heirs,) and the other half I bequeath to my said beloved wife, *Ann Rush*, whom I hereby appoint my executrix, and *Jacob Kinney* my executor."

Ann Rush, the widow, intermarried with one *Alexander*, and, with her said husband, made a conveyance of one

undivided half of said premises. She and her said husband are both dead.

Nov. Term,
1851.

The defendants claim under the conveyance of *Alexander* and wife, and the lessor of the plaintiff is one of the brothers of the testator.

Doe
v.
Kinkry.

The plaintiff requested an instruction to be given that *Ann Rush*, the widow of the testator, took an estate for life only in one-half of the real estate devised, in the event of her marriage. This instruction was refused, and the Court instructed the jury that she took a fee-simple estate under the will.

The only question presented is, whether the instruction given was right. We think it was. The word "estate," in the last sentence of this will, is used to describe the property which the testator meant to devise, and, in such cases, it is well settled that the use of this word in a will, unaccompanied by any restriction or limitation, suffices to convey all the estate the testator had. *Doe v. Harter*, 7 Blackf. 488. (1.)

The plaintiff contends that it is inconsistent with the motives which influence the conduct of men, to suppose the testator meant to give his widow a more valuable estate if she married again than if she remained single, and, therefore, it should be inferred from the whole will, that it was his intention to give her a life estate only in one-half of his real property, in case of her marriage. But we cannot, in this case, resort, with any propriety, to such an argument as this, for the purpose of ascertaining the intentions of the testator. It is true, when there is any inconsistency in the different clauses of a will, if the intention of the testator can be inferred from the whole will taken together, that intention should govern; and when there are any latent ambiguities, by reason of which the intention is not manifested or expressed with certainty, the uncertainty may be removed by evidence of extrinsic facts, or, in some cases, perhaps, by a resort to arguments founded on the motives which usually influence human conduct. But when there is no such ambiguity, and, as in this case, the intention of the testator is mani-

Nov. Term,
1851.

EX PARTE
ROBINSON.

tested, so that by giving the words used their ordinary and legal signification, no doubt remains as to the quantity or duration of the estate devised, it would be contrary to all the established rules and precedents to permit an inquiry as to the motives which might have influenced the testator, for the purpose of proving or inferring that he meant to devise a different estate. *Judy v. Williams*, May term, 1851. (2.)

It might, indeed, be a question whether the estate which the widow took, under this will, in the event of her marriage, was, in fact, more valuable than the provision made for her in case she remained single, but that is immaterial.

Per Curiam.—The judgment is affirmed with costs.

W. H. Mallory, for the plaintiff.

D. Brier, for the defendant.

(1) The word "estate," in the *operative* part of a will, passes not only the *corpus* of the property, but all the interest of the testator in it, unless controlled by the context; but where that word is not used in the operative clause of the devise, but is introduced into another part of the will referring to it, it cannot be construed to extend the meaning of the operative clause, whether prior or subsequent. *Doe d. Burton v. White*, 1 Exch. R. 526.

(2) 1 Carter's Ind. R. 449.

Ex parte ROBINSON.

An attorney at law against whom charges have been preferred, under the statute, for mal-conduct in office, is not entitled to have the charges tried by a jury.

Wednesday,
November 26.

APPEAL from the *Ripley* Circuit Court.

SMITH, J.—This was a proceeding against the appellant in the *Ripley* Circuit Court, for mal-conduct in office as an attorney and counselor at law.

Charges were filed, specifying the causes of complaint, by the direction of the Court, and the appellant pleaded

"not guilty." After hearing the evidence, it was ordered that the name of the appellant should be stricken from the roll of attorneys of the Court. The proceedings were had under the provisions of the Revised Statutes, c. 38, p. 669.

Nov. Term,
1851.

STATE BANK
OF INDIANA
v.
RODGERS.

The appellant contends that the order of the Circuit Court should be reversed, because a motion to quash the charges, and a demand of a trial by jury, were overruled, and because there is a variance between the allegations in the specifications and the proof.

The objections made to the proceedings are insufficient. The appellant was not entitled to demand a jury, and the decision of the Court is fully justified by the evidence.

Per Curiam.—The judgment is affirmed with costs.

G. Holland, for the appellant.

J. Ryman, for the appellee.

THE STATE BANK OF INDIANA v. RODGERS.

A bill of exchange was drawn, payable at Cincinnati, but the parties thereto were all residents of this state. *Held*, that the bill was within the meaning of the statute, which allows damages, upon the usual protest for non-payment, on bills drawn on persons without the jurisdiction of the state.

A bill of exchange was sold to the *State Bank*, the plaintiff, at her branch in *Lawrenceburgh*, by two of the parties, who were partners, for their own benefit, the plaintiff knowing the bill to be an accommodation bill. The greater part of this bill was paid, just before it became due, by the sale of another to the plaintiff, and the application of the proceeds to the payment of the first. When the second became due, it was paid by the sale of another to the plaintiff, of like amount, and the application of the proceeds in like manner. This process of paying each preceding bill by another of like amount, continued through a series of bills, and up to the non-payment of that on which this suit was brought; and each bill, after the first, was purchased with the understanding that the proceeds were to be applied to the payment of the preceding one. The bills all varied in respect to the parties—there being some to each bill who were not parties to the others. Each was made payable in four months from the time of the sale thereof to the plaintiff, at Cincinnati, but the parties were all residents of this state. The plaintiff, when she

Nov. Term,
1851.

STATE BANK
OF INDIANA
v.
RODGERS.

purchased the bills respectively, charged and received interest thereon at the rate of 6 *per cent. per annum* and three-fourths of 1 *per cent.* exchange. The cost of transporting specie between *Lawrenceburgh* and *Cincinnati*, did not exceed, during all this time, 2 dollars upon the thousand. At the time these several bills were sold to the plaintiff, there was a standing rule of said branch, that no note should be discounted having more than ninety days to run. *Held*, that the transactions recited did not show a device of the plaintiff to exact usury.

Wednesday,
November 26.

APPEAL from the *Ohio* Circuit Court.

SMITH, J.—Assumpsit by the appellant, upon a bill of exchange drawn by one *John Grace* upon *John B. Craft*, at *Cincinnati, Ohio*, and requesting said *Craft* to pay to the order of *Lanius* and *Athearn*, 800 dollars, four months after date. The declaration alleges that *Lanius* and *Athearn* indorsed the bill to *Rodgers*, who indorsed it to one *Espy*, who indorsed it to the appellant, who purchased it through her branch at *Lawrenceburgh*. It is averred that the bill was accepted by *Craft*, but was duly protested for non-payment, of which the defendant had notice, whereby the defendant became liable to pay the sum therein specified, with 5 *per cent.* damages.

The cause was submitted to the Court upon the general issue, and the plaintiff's damages were assessed at 800 dollars. A motion for a new trial having been overruled, judgment was rendered for that amount. From this judgment, the plaintiff appealed to this Court.

Upon the trial, the bill of exchange described in the declaration, the demand of payment, protest, and notice of non-payment, were duly proved.

The defendant then proved the following facts:

On the 17th of *December*, 1846, the plaintiff purchased a bill for 1,000 dollars, payable on the 17th of *April*, 1847, at *Cincinnati*. The names of *Craft*, *Lanius* and *Athearn*, *Rodgers*, and also one *Steele* and one *Tapley*, were upon this bill, which was paid at *Cincinnati* when due.

On the 15th of *April*, 1847, the plaintiff purchased another bill for 800 dollars, drawn by *Craft* on *Rodgers*, and indorsed by *Lanius* and *Athearn*, *Steele*, and *Grace*, payable in four months at *Cincinnati*, the proceeds of which were paid by the bank on the check of *Grace*, and were

probably used in paying the bill first named. • This second bill was due on the 18th of *August*, and was returned to the bank unpaid.

On the 19th of *August*, the bank purchased another bill for 800 dollars, also payable in four months at *Cincinnati*, drawn by *Craft* on *Rodgers*, and indorsed by *Lanius* and *Athearn*, *Steele*, and one *Caleb A. Craft*, the proceeds of which were applied to the payment of the bill due on the 18th of *August*.

On the 30th of *December*, another bill was purchased, drawn by *J. B. Craft* on *Rodgers*, and indorsed by *Lanius* and *Athearn*, *Espy*, and *Grace*, payable in four months at *Cincinnati*, the proceeds of which were applied to the payment of the bill purchased on the 18th of *August*.

On the 1st of *June*, 1848, the plaintiff purchased the bill now in suit, the proceeds of which were drawn by one of the parties and applied to the payment of the bill purchased on the 30th of *December*.

On each of these bills, the plaintiff charged and received interest at the rate of 6 *per cent. per annum*, and three quarters of 1 *per cent. exchange*.

The defendant then introduced *William Lanius* as a witness, and proved by him that *Lanius* and *Athearn* were the persons who really received the proceeds of said first named bill of exchange, and they alone were the persons really benefited and accommodated by the negotiation of all the bills, the other parties, on each, having put their names thereon for the accommodation of said firm.

Lanius also testified that the object of the firm of *Lanius* and *Athearn*, in having the first bill made up, was to obtain a loan from the bank, believing they would be more likely to get the money by the sale of a bill, than on a note, as the bank could make more profit thereby; that the bill was not founded on any business transaction, and the parties to it were not indebted to each other, or to the firm; and that, when it was discounted, *Lanius* and *Athearn* did not expect to have funds in *Cincinnati* to meet it, arising from any shipment or commercial transaction which would put money there.

Nov. Term,
1851.

STATE BANK
OF INDIANA
v.
RODGERS.

Nov. Term,
1851.

STATE BANK
OF INDIANA
v.
RODGERS.

He further testified that he was a director of said branch, at the time, and believed the board knew that the first bill, and all the others, were negotiated for the benefit and accommodation of his firm; and that, at the time of the sale of each of the subsequent bills after the first, it was understood by said branch, the proceeds would be applied to take up the next preceding one.

He also testified that, at the time each of the bills was sold, *Lanius* and *Athearn* were engaged in the business of distilling whisky and manufacturing flour; and shipped their products to *Cincinnati*, but always received returns next day; that all of the parties on all the bills were, at the date of the first bill, and ever since have been, residents of *Ohio* county, *Indiana*, which fact was known to the officers of said branch; that *Laurenceburgh* is only twenty-two miles from *Cincinnati*, and 2 dollars would pay the expense of carrying 1,000 dollars in specie from one of those places to the other.

The plaintiff then proved, by the cashier of said branch, that the several bills were each of them complete and perfect, and accepted by the drawee, at the time they were purchased; that the exchange charged was the usual and current rate at which said branch, at the times the bills were purchased, was buying bills on *Cincinnati*; that he attended the sittings of the board when the bills were bought, and heard of no understanding or agreement at the sale of either, that another bill would be purchased or a note discounted to enable the parties, should they otherwise be unable, to meet it at maturity; that his impression was, from what *Lanius* told him, that *J. B. Craft* was the real debtor on said bill as between the parties; that none of the parties at, or shortly before, the sale of either of the bills, had applied for a loan of money, without success; and that, when the bills were presented, there was a standing rule of said branch that no note should be discounted having more than ninety days to run, so that, without suspending this rule, a note at four months could not have been discounted.

Lanius also testified that he gave the board of directors

to understand that the first bill was for the use of his firm, but does not remember that he told the board the bill was not founded on a business transaction, or that he did not expect to have funds in *Cincinnati* to meet it.

The appellant contends that she was entitled to interest on the bill from the date of its maturity, and to damages for its non-payment.

The judgment is for the amount of the bill, without interest or damages, and the appellee endeavors to sustain it on two grounds :

1st. As respects the damages, that the appellant was not entitled to any, because the parties to the bill were all residents of this state, and, therefore, the bill is not within the meaning of the statute which authorizes damages on bills drawn on persons without the jurisdiction of the state. R. S., c. 31, s. 18, p. 579. It has been settled, however, in the case of the *State Bank v. Bowers*, 8 Blackf. 72, that such a bill is within the statute.

2d. The appellee contends that the Circuit Court rightly refused to give interest or damages, because the evidence shows that a loan was made in the shape of a bill, or series of bills, as a usurious device to exact more than the legal rate of interest. If such was the fact, that is, if the plaintiff did make the loan in that particular mode or form for the purpose of evading the law on the subject of usury, and not as a *bona fide* exercise of her legitimate powers, this position of the appellee may undoubtedly be correct; and the principal question we have to examine, is, therefore, whether the evidence warrants such a finding.

With regard to the origin of the first bill in the series, it may be regarded as proved that the board of directors knew it was sold to them for the benefit or accommodation of *Lanius* and *Athearn*, but, from that fact alone, no inference could be legitimately drawn that they intended to make a usurious loan. They had a right to deal in bills of exchange, and nothing is more common than the negotiation of bills where one of the parties is known to be the principal and the others merely sureties, when

Nov. Term,
1851.

STATE BANK
OF INDIANA
v.
RODGERS.

Nov. Term,
1851.

STATE BANK
OF INDIANA
v.
RODGERS.

such bills are, in fact, founded on ordinary commercial transactions. *Lanius*, it is true, testified that the bill was offered for the purpose of obtaining a loan, that it was not founded on any commercial transaction, and that his firm did not expect to have funds to meet it at maturity. But it does not appear that he communicated any of those facts to the board of directors, and no inference affecting the rights of the plaintiff can be fairly drawn from these secret or uncommunicated motives of *Lanius*, or *Lanius* and *Athearn*.

Neither do we think the facts that exchange was charged on each bill in the series, and that each bill after the first was discounted with the understanding that the proceeds should go to take up the preceding one, amount to proof of a design to make a continuous loan or to charge usurious interest. Where a bill is drawn in good faith upon a distant point, and the acceptor is unable to meet it when due, it may often be greatly conducive to the interest of the drawee, or other parties interested, to be able to negotiate a second bill for the purpose of paying off the first, and we cannot see any impropriety in the bank permitting them to do so at their solicitation. In the present case, all of the bills in the series varied from each other in respect to the parties, there being names on each one not on any of the others. We are not sure that this fact would make any material difference, but, at all events, we think that, in this case, the negotiation of each bill, so far as appears from the evidence, was a separate and distinct transaction.

The only remaining fact which is urged as conducing to prove the design imputed to the plaintiff, is, the difference between the rate of exchange charged, three-fourths of one *per cent.*, and the cost of transporting specie between *Lawrenceburgh* and *Cincinnati*. We do not think there is any evidence whatever that the rate charged was exorbitant or illegal. The cost of the transportation of specie, certainly, is not the proper criterion to judge of the value of exchange (1).

Upon the whole, if all the facts detailed in the evidence

had been shown to have been within the knowledge of the bank, and if the whole series of bills had been the result of a previous contract or understanding between the parties to make a continuous loan, charging exchange at intervals by way of addition to the legal interest on ordinary loans, those facts might have warranted a very different decision, but as there is no evidence whatever of such a knowledge or agreement on the part of the bank, we can see no satisfactory grounds upon which the charge of usury can be sustained.

Per Curiam.—The judgment is reversed with costs; and the proceedings back to the finding of the Court upon the issue submitted are set aside, with directions to the Court to render a judgment in conformity with this opinion.

P. L. Spooner, for the appellant.

J. W. Chapman and *E. Dumont*, for the appellee.

(1) There is no rule of law fixing the rate which may be lawfully charged for exchange. Though the price is influenced by the cost of the transportation of specie from one place to another, yet it is also materially affected by the state of the trade, by the urgency of the demand for remittances, and by the quantity brought into the market for sale; and, sometimes, material changes take place in a single day, although no alteration has taken place in the expense of transporting specie. *Andrews v. Pond*, 13 Peters, 65.

McKINNEY v. SPRINGER.

To a declaration upon the common counts for work and labor, the defendant pleaded as follows: 1. That the causes of action did not accrue within five years, &c. 2. That the defendant did not, at any time within five years, &c., undertake and promise, in manner and form, &c. *Held*, that the pleas were identical.

The proviso in the 11th section of the act of 1838 regulating the practice in suits at law, which enacts that, if in any of the actions or suits enumerated in that section, judgment be given for the plaintiff and afterwards reversed for error, a new action may be commenced within a year after such reversal, applies to suits in chancery as well as to actions at law.

Nov. Term,
1851.

McKINNEY
v.
SPRINGER.

Nov. Term,
1851.

McKINNEY
v.
SPRINGER.

A party who has applied to chancery for relief and obtained a decree, when his remedy was exclusively at law, may, under said proviso, at any time within a year after the reversal of such decree for error, prosecute his action, for the same matter, at law.

Where one has entered into a special agreement to perform work for another, and furnish materials, and has done work and furnished materials, but not in the manner stipulated by the contract; or where he has voluntarily abandoned the work before its completion; yet if the work done and the materials furnished are accepted and used by the other party, the latter is answerable to the amount whereby he is benefited, upon an implied promise to pay for the value he has received.

But such amount cannot exceed the price which would have been allowed, under the contract, for the same amount of work, or quantity of materials, had the contract been fulfilled.

The mode of ascertaining the real benefit received from the part performance of work, in cases like the present, is to estimate the whole work at the price fixed by the contract, and to deduct from that the amount requisite to complete the part of the work left unfinished. If any loss is occasioned by the unfinished part costing more in proportion than the whole was undertaken for, the loss must be borne by the party who originally contracted to do the whole. The amount to be allowed may, in some cases, be less than the proportion which the work done would bear to the cost of the whole, but cannot exceed it.

It seems that the defendant may, in an action of this kind, reduce the amount to be recovered by showing that he sustained special damage by reason of the non-performance of the contract by the plaintiff, or he may waive the recoupment of such damages and bring a cross action to recover them.

Where an entire job of work was to be done under a special contract, and the compensation was to be, on its completion, the conveyance of a lot of ground, and the workman, having done a part of the work, abandoned the contract, but the party for whom the work was done received and retained the benefit thereof, it was *held*, that the value of the lot was to be considered as representing the compensation the workman was to receive, and from it should be deducted the amount necessary to make up the deficiencies of the other party in the completion of the contract.

Where a building is in process of construction under a special contract, and additions or alterations are made, the original contract, unless it has been so entirely abandoned that it is impossible to trace it and to say to what part of the work it is applicable, is held still to exist, and to be binding on the parties as far as it can be followed.

Interest is allowable, under the statute, for a vexatious delay of payment for work.

Where work is done and materials furnished in continuation of an entire job, if one of several items is within the period of the statute of limitations, the statute does not bar the recovery upon any.

Wednesday,
November 26.

APPEAL from the *Decatur* Circuit Court.

SMITH, J.—Assumpsit by *Springer* against *McKinney* for

work and labor. The first count alleges that on the 16th of *May*, 1840, the defendant was indebted to the plaintiff 2,200 dollars for building a certain house, and being so indebted, the defendant promised to pay the plaintiff that sum, &c. The second and third counts allege an indebtedness for so much as the building of the said house was reasonably worth.

Nov. Term,
1851.

McKENNEY
v.
SPRINGER.

The defendant filed the following pleas :

1st. The general issue.

2d. That said causes of action did not accrue within six years.

3d. That the defendant did not, at any time within six years, undertake and promise in manner and form, &c.

4th. That the defendant did not, at any time within five years, undertake, &c.

The fifth plea was rejected and is not upon the record.

6th. That the Revised Statutes of 1843, were received by the clerk of the *Decatur* Circuit Court on the 6th of *March*, 1844, and a record was made of such reception ; and that the defendant did not, within five years next before said 6th day of *March*, nor at any time within five years before the commencement of the suit, undertake, &c.

7th. The seventh plea is exactly similar to the sixth, except that it alleges the causes of action *did not accrue* within five years before said 6th day of *March*, nor within five years before the commencement of the suit.

There are also two pleas of set-off, but as no evidence was given under them they need not be noticed.

The fourth plea was adjudged bad on demurrer, and the seventh plea was rejected, on the motion of the plaintiff, upon the ground that it is substantially similar to the sixth.

Upon a former trial, a demurrer had been sustained to the sixth plea, and, for that reason, the judgment was reversed by this Court. See case between the same parties, 8 Blackf. 506. The plaintiff, after the cause had been remanded, obtained leave to withdraw the demurrer and file the following replication :

That in *May*, 1840, the plaintiff commenced a suit in

Nov. Term,
1851.

McKENNEY
v.
SHAWMUT.

chancery for the same causes of action, and obtained a judgment in the Circuit Court, which judgment was reversed by the Supreme Court, for error, on the 21st of February, 1844, and his bill was dismissed without prejudice; and that said suit in chancery was commenced within five years after the promise, and the present suit was commenced within one year after said decree was reversed.

This replication was demurred to, but the demurrer was overruled; and the plaintiff having taken issue on the first plea, and traversed the other pleas before noticed, the cause was submitted to a jury upon the issues remaining undisposed of, and the plaintiff obtained a verdict and judgment for 2,200 dollars damages.

The first error assigned is, that the rejection of the seventh plea was erroneous. The appellant contends that the sixth and seventh pleas are essentially different, as under the one the statute of limitations would begin to run at the time of the promise, and under the other at the time the cause of action accrued. In the present case, the promises laid in the declaration are all implied, and as no implied promise could arise until the cause of action accrued, the two pleas must be regarded as identically the same, at least for the purposes of this suit. Whenever there was an indebtedness such as is averred in the declaration, there was a cause of action, and at the same time the promise to pay was implied from the indebtedness. Whether there are any cases in which the statute begins to run before payment is due, we need not now stop to inquire. The general rule is, that the statute does not begin to run at the time of the making of a contract or promise, but from the time the plaintiff might have brought his action, if he was not, at that time, subject to any of the specified disabilities. Chit. on Con. 708, 8 Am. Ed.

The appellant also contends that the Court erred in overruling the demurrer to the replication to the sixth plea. The statute of limitations relied on in that plea, is that contained in the 12th section of the act regulating

the practice in suits at law, in the Revised Code of 1838, p. 447. By that section, all actions of debt on simple contract, for rent arrear, actions on the case (other than for slander), actions of account, trespass, trespass *quare clausum fregit*, detinue, and replevin, were required to be commenced within five years, and after enumerating the actions to be commenced within shorter periods, there is a proviso that if, in any of the said actions or suits, judgment be given for the plaintiff and afterwards reversed for error, a new action may be commenced within a year after such reversal. It is urged that this proviso refers to actions at law only, and, it is true, actions or suits in chancery are not expressly named, but we think they are within the spirit and intention of the statute. It is also said that the cause of action relied on in this suit, could not have been a proper subject of chancery jurisdiction, and that the actions referred to in the proviso, should be interpreted to mean actions whereof the Courts in which they were brought had competent jurisdiction. To give it this construction would greatly cripple the effect of the proviso, and would defeat, in a great measure, the object the legislature seems to have had in view, namely, if the plaintiff had made an effort to recover his debt by commencing an action within the limited time, but, owing to some error in the mode or form of bringing his suit, or in the proceedings, a proper judgment could not be rendered, and while he was prosecuting such an erroneous action the statute of limitations had run out—to give him sufficient additional time to commence a new suit. In a large majority of the cases where a new suit would be necessary, it would be because of a want of jurisdiction of the first action. Most other errors would be rectified by new trials. We think, therefore, the meaning of the proviso ought not to be so limited.

Upon the trial, the plaintiff, to sustain the issues on his part, proved that he had done certain work in the building of a house for the defendant, and then called several witnesses to prove the value of the work so done according to the customary prices.

Nov. Term,
1851.

McKINNEY
v.
SPRINGUE.

Nov. Term,
1851.

McKINNEY
v.
SPRINGER.

The defendant then proved that the work was commenced under a special contract in writing, by which the plaintiff agreed to build a house of the specified dimensions, &c., and to complete the same on the 1st day of *August*, 1838; and the defendant, in consideration therefor, was to convey to the plaintiff a certain house and lot in the town of *Greensburgh*.

The house was not finished on the day specified, and there was evidence tending to prove that the plaintiff continued to work upon it, with the knowledge of, and without objection by, the defendant, until some time in the year 1839, when the work was abandoned and the defendant took possession of the house, which was still incomplete.

It also appeared that, during the progress of the work, some alterations of the original plan and specifications were made by the agreement of the parties; and there was some evidence that a portion of the work done was defective and not executed in a workman-like manner.

The Court gave several instructions to the jury, some of which were to the following effect:

That if the work upon the building in question was undertaken by the plaintiff under the written contract given in evidence, and the plaintiff failed to complete the house according to the terms and at the time specified, and the plaintiff abandoned the work while in an unfinished state, without the fault of the defendant, and without his requiring the plaintiff to quit, they should find for the defendant; but if, after the time specified in the contract for its completion, the defendant suffered the plaintiff to proceed with the work, and then, before its completion, required the plaintiff to quit, the plaintiff should recover the reasonable value of the work done and materials furnished, if the defendant has had the use and benefit of them.

That if, after making the written contract, the defendant agreed, by parol, to alterations in the plan of the building, or of the terms of the agreement in any matter, and the plaintiff finished the work according to the altera-

tions or change in the contract, though he could not recover on the written contract, he could recover the value of the work.

Nov. Term,
1851.

McKINNEY
v.
SPRINGERS.

That, if the jury find for the plaintiff, the measure of damages should be the reasonable value of the work and materials—provided that does not exceed the amount he would have received for the same amount of work if the contract had been finished according to its terms.

That if they should find for the plaintiff, and believe, from the evidence, that payment has been vexatiously and unreasonably delayed by the defendant, they might give interest to the plaintiff for such delay of payment.

That if the items of work and materials for which the suit was brought, were done and furnished in continuation of one and the same job, and some portion of such labor and materials was done or furnished in *July*, 1830, or at any other period within six years before the commencement of the suit, they may find for the plaintiff for all the items proved, although some of them may have been done or furnished before that time.

There are several errors in these instructions, which we must proceed to notice.

It is a well established principle, that where one has entered into a special agreement to perform work for another and furnish materials, and work is done and materials furnished, but not in the manner stipulated in the contract, yet, if they are accepted and used by the other party, he is answerable to the amount whereby he is benefited, on an implied promise to pay for the value he has received, though no action can be maintained on the special contract. The doctrine is stated in general terms in *Lomax v. Baily*, 7 Blackf. 603, though that was an action of covenant on the special agreement, and the plaintiff failed. See also, *Hollingshead v. Matchee*, 13 Wend. 276; *Van Deusen v. Blum*, 18 Pick. 229; *Adams v. Hill*, 16 Maine R. 215.

In this case, therefore, if the defendant had the benefit of certain labor and materials of the plaintiff, the latter was entitled to recover a compensation equal to the bene-

Nov. Term,
1851.

McKINNEY
v.
SPRINGER.

fit the defendant had so received; and his right to recover did not depend upon the question whether the work was finally abandoned at the requirement of the defendant or not, as is assumed in the instructions.

The plaintiff was clearly in default in not having completed his contract in the time and manner specified, and, therefore, he does not bring his action on the agreement, but relies on a general count for work and labor. The defendant cannot say, in defense, that he rescinded the contract in consequence of the default of the plaintiff, inasmuch as he has received some benefit from the plaintiff's part performance; and whether the plaintiff finally abandoned the work voluntarily or not is immaterial; but the defendant may show the agreement, to limit the damages; and the value of the work done and materials furnished is to be estimated, in such cases, according to the actual benefit received by the defendant from such part performance, in obtaining the completion of the work stipulated to be done. The plaintiff, having contracted to furnish the work in a finished state, is not entitled to have the value of his services estimated according to the customary prices paid under other circumstances, for that would not be a fair criterion of their value to the defendant.

In the case of *Koon v. Greenman*, 7 Wend. 121, the plaintiff agreed to do certain mason-work in the building of a dwelling-house, the materials to be furnished by the defendant, and the work to be completed by the 1st of August, 1828, for which the defendant was to pay a stipulated price. The plaintiff commenced the work, but was delayed by the neglect of the defendant to furnish materials, and, in the month of October, having performed part of the work, he quit, refused to finish it, and brought suit. On the trial, the plaintiff called witnesses to prove the value of the work done, and their evidence was admitted in the Court below, but the judgment was, for that reason, reversed; the Supreme Court holding, that so far as the work was done under a special contract, the prices stipulated in it afforded the best evidence of the value of the work, and that, unless it appeared that the work was ren-

dered more expensive to the plaintiff by the improper interference of the defendant, the contract prices were conclusive between the parties.

Nov. Term,
1851.
McKINNEY
v.
SPRINGER.

In *Ladue v. Semour*, 24 Wend. 60, an action was brought to recover payment for tanning 500 hides. The work had not been completed within the time specified in a written contract. *Bronson*, C. J., said, the question was not what the work and materials cost the plaintiff, or how much, under other circumstances, he ought to have—he could not be entitled, in any event, to more than the contract price, and from this must be deducted all the defendant had lost by the want of a strict performance of the agreement.

So, in the case of *Vanderbilt v. The Eagle Iron Works*, 25 Wend. 665, it was held that where work to be done in a particular manner was accepted and reduced to use, though it was not done in the manner stipulated, the party for whom it was done was liable in an action for the value, but could claim a deduction for the part left unperformed.

Brewer v. The Inhabitants of Tyringham, 12 Pick. 547, is another case to the same effect. The action was on a *quantum meruit* for building a bridge. The plaintiff had performed part of the work, pursuant to a contract, and left the rest unfinished. The defendants finished the work, and the plaintiff recovered the price agreed upon, after deducting the expenses incurred by the defendants in completing it.

Mr. *Chitty* states the measure of damages in such cases to be “the stipulated price, less the sum which it would take to complete the work according to the agreement.” *Chit. on Con.* 493, 8th Am. Ed.

In the last clause of the first instruction above quoted, the jury are told that, if the defendant had the benefit of the plaintiff's work and materials, the latter should recover their reasonable value. This instruction, as applied to the circumstances of this case, is erroneous; and the error is not fully remedied by the instruction relative to the measure of damages, which limits such reasonable value to the amount the plaintiff would have received for

Nov. Term,
1851.

McKINNEY
v.
SPRINGER.

the same quantity of work, if he had completed his contract. The jury would understand, from these instructions, in applying them to the evidence given, that the "reasonable value" they were to put upon the plaintiff's labor and materials, was, not their reasonable value to the defendant, under the particular circumstances of the case, but their reasonable value, to be estimated according to the customary prices charged by other workmen. By the rule thus given, if a man contracts with another to build a house for a certain price, and leaves the house only half finished, he would be entitled to recover half the stipulated price, when that did not exceed the customary rates, if the owner took possession of the unfinished building, which, in most cases, he could not well avoid doing. It would give the builder a very unfair advantage, for he could stop when he pleased, and compel the owner of the property to pay him a full price for what work he had done, whatever losses might have been sustained by his failure to complete his undertaking. In such cases, the owner of the property contracts to pay a gross sum for a house when complete, not a ratable proportion of that sum for so much of the building as should be erected; and if, through the default of the builder, he obtains only an unfinished house, the proper mode of ascertaining the real benefit received by him, from such part performance, is to estimate the whole work at the price the parties had agreed upon, and deduct from that the amount necessary to complete the portions of the work left unfinished. If there is any loss occasioned by such unfinished work costing more in proportion than the whole work was undertaken for, such loss is the consequence of the default of the party who originally contracted to do it, and upon him it ought to fall. There may be cases in which the builder would not be entitled to recover so much as the proportion which the work done would bear to the cost of the whole, but he ought not to recover more than that proportion.

It seems that the defendant may, in an action of this kind, reduce the amount to be recovered, by showing that

he has sustained special damages by reason of the non-performance of the contract by the plaintiff, or, he may waive the recoupment of such damages, and bring a cross action to recover them. *Epperly v. Bailey*, at this term. Nov. Term, 1851.
 McKINNEY
 v.
 SPRINGER.

In the present case, the plaintiff was to be compensated for building the house in question, by receiving the conveyance of a lot of ground; but this fact will not occasion any difficulty in the application of the proper measure of damages. If the plaintiff had finished his contract and brought an action on the special agreement, the measure of damages would have been the value of the lot he was to have received, not the reasonable or customary value of the work done. *Ellison v. Dove*, 8 Blackf. 571.—*Lucas v. Heaton*, Ind. R. 184 (1). So, in this suit, the value of the lot must be considered as representing the compensation the plaintiff was to receive for the whole work, and from it must be deducted the amount necessary to make up the plaintiff's deficiencies in the completion of his contract.

The instruction relative to the effect of the alterations in the plan of the building, made by the parties during the progress of the work, is also erroneous. When a building is in process of construction, and additions or alterations are made, the original contract, unless it be so entirely abandoned that it is impossible to trace it and say to what part of the work it shall be applied, is held still to exist, and to be binding on the parties as far as it can be followed. The additions, or alterations, if the expense of the work is thereby increased, may be the subjects of a new contract, either express or implied, but they do not affect the original contract, which still remains in force. Chit. on Con. 492.—*Lovelock v. King*, 1 Moo. & Rob. 60.—*Wright v. Wright*, 1 Litt. 181.—*McCormick v. Connelly*, 2 Bay, 401. In this case, the evidence shows that the alterations were not of such a character as materially to interfere with the specifications of the original contract.

The instruction to the jury, that they might give interest for a vexatious delay of payment, is in conformity

Nov. Term,
1851.

RUCKER
v.
BEATTY.

with a statutory provision, and is not objectionable. R. S. c. 31, s. 28, p. 581.

The last instruction to be noticed is that having reference to the statute of limitations. So far as it may be understood to mean that the statute would not begin to run until after the plaintiff had ceased to work upon the house in question, this instruction is correct; a contract to build a house, being in law an entire contract to do the thing stipulated, and not a contract for each separate item of work or materials done or furnished in the progress of the undertaking. So far as it favors the idea that the plaintiff is entitled to recover for those items of work and materials, what he had proved them to have been worth according to the customary prices paid at the time for similar work and materials, it is, like the other instructions before noticed, erroneous (2).

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. Davison, for the appellant.

J. Robinson and *J. S. Scobey*, for the appellee.

(1) 1 Carter's Ind. R. 264.

(2) The doctrine stated in the present case, in relation to the right to recover damages upon the part performance of a special contract, is in conflict with that asserted in *Swift v. Williams*, 2 Carter's Ind. R. 365, and *Hoagland v. Moore*, 2 Blackf. 167; and those cases may be deemed, as to that doctrine, to be overruled. See, also, *Cranmer v. Graham*, 1 Blackf. 406, where the doctrine stated in the two last-named cases seems also to have been held.

RUCKER v. BEATTY.

An opinion expressed by a witness, inconsistent with a fact testified to by him, cannot be given in evidence to impeach his credit.

In an examination to impeach the credit of a witness by proof of his general bad character, the inquiry must be limited to his character at the time of the examination.

ERROR to the *Rush* Circuit Court.

Nov. Term,
1851.

PERKINS, J.—*Josiah Gordon* sued *James S. Rucker*, in trespass, for criminal conversation with said *Gordon's* wife. *Rucker* pleaded the general issue. The cause was tried by a jury, and *Gordon* obtained a verdict and judgment for 500 dollars. *Gordon* died, and *Beaty*, his administrator, was made a party to the judgment, and is the defendant in this Court.

RUCKER
v.
BEATY.

Wednesday,
November 26.

A bill of exceptions states that, on the trial, "one *William Moore*, having been called by the plaintiff and sworn as a witness, on cross examination, stated, on the question of the defendant, that the plaintiff had not said to him that he brought this suit to prevent the defendant from suing him. Whereupon the defendant asked the witness if he had not himself told one *John Ross*, in his shop at *Burlington*, in said county, last winter, that that was the reason why the plaintiff sued; to which the witness replied that he had no recollection of having so told *Ross*. Thereupon, said *Ross*, a competent witness, was called and sworn, and asked if *Moore* did not tell him as above, in his shop last winter;" and, objections being made, the the Court directed the witness not to answer, &c.

We think the Court committed no error in this. It will be observed that the witness was not asked whether he did not tell *Ross* that the plaintiff had told him the reason he sued was to prevent the defendant suing him, but whether he had not himself expressed the opinion to *Ross* that such was the reason of the suit. Now, whether he had expressed such an opinion to *Ross* or not, or whether he, even then, privately entertained such an opinion or not, had nothing to do with the facts of the case, and was irrelevant and immaterial.

The bill of exceptions further states that "*James Havens*, a competent witness, was called by the defendant, for the purpose of proving the general character of the said witness, *Moore*; and being asked if he was acquainted with the general character of said witness, at that time, answered that he did not know that he was; he was then asked if he was acquainted with that character some five

Nov. Term,
1851.

EPPERLY
v.
BAILEY.

years ago. The plaintiff objected to this question being answered, and the Court sustained the objection, the defendant having already adduced other evidence tending to prove that the character of said *Moore* was, at the time of the trial, bad."

We do not see that the defendant was injured by this ruling of the Court. The general rule, in cases like this, is, that testimony as to character must relate to the time at which the witness, sought to be impeached, is examined; and if the defendant had already shown that the character of *Moore* was then bad, he had accomplished all that was necessary. If he had not been able to establish that it was then bad, he had no right to go back five years for the sake of attacking it. If he had shown it to be bad at the time of the trial, we do not see that there was any objection to his also showing it to have been always bad, except the time that would have been consumed in the examination. That time the Court was not bound to waste.

The plaintiff in error objects generally to the instructions that were given to the jury, and to the refusal to give others that were asked, but specifies no particulars. We think there is no error in this part of the case.

Per Curiam.—The judgment is affirmed with costs.

S. W. Parker, for the plaintiff.

J. S. Newman, for the defendant.

EPPERLY v. BAILEY.

Where a party has sold and delivered chattels, or performed labor for another, under a special contract which he has failed to complete, and such part performance has been a benefit to the party receiving it, which benefit he has retained after the expiration of the time for completing the contract, an action on the *quantum valebat* or *quantum meruit* may be supported for the chattels delivered or the work done.

In such a case, the defendant may prove, by way of recoupment, whatever

damages he has sustained by reason of the non-fulfillment of the special contract; or he may resort to a cross action to recover them.

Nov. Term,
1851.

EPPERLY
v.
BAILEY.

Wednesday,
November 26.

ERROR to the *Wayne* Circuit Court.

PERKINS, J.—Assumpsit by *Bailey* against *Epperly*. The declaration contained a special, and the common counts. The special count was upon this instrument:

"Article of agreement made and entered into between *Joel Epperly* and *John Bailey*, both of the county of *Wayne*, in the state of *Indiana*, on this 11th day of *January*, 1847, witnesseth: That the said *John Bailey*, on his part, is to deliver, or cause to be delivered, on his account, unto the said *Joel Epperly*, at his pork-house in *Fairhaven*, *Butler* county, *Ohio*, sixty thousand pounds of good bulked meat, the hog round, and as much more as the said *Bailey* has on hand to spare, and also sixty barrels of lard, and as much more as the said *Bailey* may have to spare; the meat and lard to be delivered between this date and the first day of *March* next. In consideration and payment of which, the said *Joel Epperly*, on his part, is to pay the said *Bailey*, or order, the sum of three dollars and sixty-five cents for each one hundred pounds of meat, and six cents per pound for the lard, to be paid on the meat and lard as said *Bailey* delivers it, if said *Bailey* requires it; and full and entire payment to be made when the whole of the meat and lard is delivered according to the above agreement." (Signed by the parties).

The plaintiff, *Bailey*, alleged, in the special count, that he had delivered a part, and was ready and offered to deliver all, of the meat and lard, according to the contract, and had not been paid, &c.

Epperly pleaded non assumpsit to the whole declaration. The issue was tried by a jury who found a verdict for the plaintiff, and the Court rendered judgment on the verdict. It was proved that *Bailey* had delivered, and *Epperly* received and kept, a part, but not all, of the meat and lard stipulated for in the contract. The time for the completion of the delivery had passed before this suit was brought.

On the trial, the Court instructed the jury that "if the

Nov. Term,
1851.

EFFERLY
v.
BAILEY.

plaintiff did not deliver the pork and lard according to the written agreement, or offer to do so, as alleged in the declaration, he cannot recover on the first count of the declaration, which is founded on the written contract. But, under the common counts, the plaintiff is entitled to recover the reasonable value of the pork and lard actually delivered by the plaintiff and received by the defendant, not, however, to exceed the price contracted to be paid." This instruction raises the only material question in the cause.

There are many cases, especially among the earlier ones, which lay down the general principle that where the contract is entire, as where *A.* agrees to do a certain thing for which *B.* is to make a certain compensation, the doing of the entire thing by *A.* is a condition precedent, and he has no remedy, in any form, until he has fully performed his part of the contract; but this principle being found to operate inequitably in many cases, exceptions to it have been established, and justly; and we think the general proposition may now be asserted, that where a party has sold and delivered chattels or performed labor for another, under a special contract, which, for any cause, he has failed to complete, and such part performance has been a benefit to the party receiving it, which benefit he retains after the time for the completion of the contract has expired, an action on the *quantum valebat*, or *quantum meruit*, may be supported (1); and the question of difficulty in each of these cases now, is, the amount of damages that may be recovered. This depends much upon the course pursued by the defendant on the trial. According to the leading *American* authorities, which differ on this point from some, at least, of the *English*, but which we prefer to follow, a defendant may show all the damages he has sustained by the non-completion of the special contract, in reduction of the amount to be recovered by the plaintiff for what he did do, or render, in part performance of such contract, instead of resorting to a cross action for such damages. Some of the *English* authorities hold that a cross action must be resorted to.

See *Mondel v. Steel*, 8 M. and W. 858. Preferring the rule of the *American* cases, we shall not stop to examine the *English*. The *American* cases, however, concede the right to the defendant of waiving his damages in defense of such action, and of resorting to a cross action at his election (2). It is very manifest, therefore, that the instruction to be given by the Court, in the cases under consideration, must vary according to the courses pursued by the defendant in such actions. If the defendant waives his damages and resorts to a cross action, then the instruction, as given in this case, that the plaintiff may recover the reasonable value of his work done or property delivered, not exceeding the contract price, will be correct. But should the defendant set up his damages in such suit, then the instruction should be, that the plaintiff recover the reasonable value, &c., after deducting all damages occasioned by his breach of the special contract. It will not be improper here to notice some of the cases upon this point.

Shaw v. Badger was this. *Bela Badger* sued *Robert Shaw* for goods sold and delivered, &c. He proved that he had sold to *Shaw* five head of cattle for 217 dollars. *Shaw* then offered to prove, in the defense, that, at the same time, and in the same contract, *Badger* also sold to him, to be delivered shortly after, thirty-four sheep, at four dollars ahead, which had not been delivered, but were, soon after said sale to *Shaw*, sold to another person, at four dollars and twenty-five cents a head; and the Supreme Court of *Pennsylvania* held that *Shaw* had a right to have deducted, in said suit, the damages he sustained in consequence of the breach of contract by *Badger*, in not delivering the sheep so purchased with the cattle. 12 S. and R. 275.

Bomker v. Hoyt is as follows: *Bomker* sued *Hoyt* and another, in assumpsit, for 410 bushels of corn sold and delivered. The defendant showed upon the trial, that the corn was delivered upon a special contract for the sale and delivery of 1,000 bushels, and that the plaintiff had failed to deliver, &c. The Court held that the plaintiff

Nov. Term,
1851.

EFFERLY
v.
BAILEY.

Nov. Term,
1851.

EFFERLY
v.
BAILEY.

could maintain his assumpsit for the value of the corn delivered, and that the defendants might reduce the plaintiff's claim, by showing any damages they sustained by the plaintiff's failure to fulfill his contract; and thus substantial justice be done without subjecting the defendants to the necessity of bringing a cross action. 18 Pick. 555.

The following is a late case in *New York*: *Rose* sued *Barber*, and declared on a special contract by which the plaintiff agreed to lay a quantity of stone wall and dig a ditch for the defendant, for the sum of 100 dollars; and also on the common counts. On the trial it appeared that the plaintiff agreed to build the wall and dig the ditch for 100 dollars, the work to be completed in a certain time; that the plaintiff commenced the work, but, failing to complete it by the stipulated time, the defendant told him to go on with the job, and he would turn in and help him, on being allowed pay for his services. The defendant did, with this understanding, assist the plaintiff to complete the work; and, in said suit, he offered to show, among other things, by way of *recoupment of damages*, that he had sustained loss by reason of the ditch not having been finished at the time specified in the original contract. The Supreme Court held, that he was entitled to do so. They say that, by said breach of the contract, "a cause of action had arisen in his favor, and he did not discharge it, nor agree that the plaintiff should go free, in consideration of doing in part what he had bound himself to do in whole;" and that "a waiver of time was not a waiver of damages;" and further, that "the defendant was entitled to recoupe the damages; or, if they had been large enough, he might have urged them" in bar of the plaintiff's entire claim. *Barber v. Rose*, 5 Hill's (N. Y.) R. 76.

Britton v. Turner, 6 N. H. R. 481, is the last case we will mention. It was assumpsit for work and labor. The declaration contained a count upon the *quantum meruit*, averring the labor to be worth 100 dollars. It was shown in defense that the work was done under a special contract, by which the plaintiff was to labor one year for the defend-

ant for 120 dollars, and that he left the defendant's service, without cause, before the end of the year. The Court held, in a very able and elaborate opinion, that the action was maintainable, but that the plaintiff, if the defendant saw fit to make the defense, would only be entitled to recover "the reasonable worth, or the amount of the advantage" the defendant received in the whole transaction. They say: "If a person makes a contract fairly, he is entitled to have it fully performed, and if it is not done, he is entitled to damages. He may maintain a suit to recover the amount of damage sustained by the non-performance. The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defense, he is entitled so to do, and the implied promise which the law will raise in such case, is to pay such amount of the stipulated price for the whole labor as remains, after deducting what it would cost to procure a completion of the residue of the service; and, also, any damage which has been sustained by reason of the non-fulfillment of the contract." "There may be instances, however, where the damage occasioned is much greater than the value of the labor performed, and if the party elects to permit himself to be charged for the value of the labor, without interposing the damages in defense, he is entitled to do so, and may have an action to recover his damages for the non-performance, whatever they may be" (3). Mr. *Sedgwick*, in his valuable work on the measure of damages, gives his approval to this, as he calls it, *New York and Massachusetts doctrine of recoupment*; p. 486.

In the case before us, the evidence is upon the record; and it shows that the defendant did not, in this suit, claim damages for the breach of the contract, and that he had brought a cross action. The instruction in the cause, as above set out, was, therefore, right. Whether the defendant may give evidence of his damages, in these cases, under the general issue, or whether he must put in a

Nov. Term,
1851.

EFFERLY
V.
BAILEY.

Nov. Term,
1851.

NICKLAUS
v.
ROACH.

special plea, or a notice of his intention to claim his damages, are not questions arising in this suit.

Per Curiam.—The judgment is affirmed with 1 *per cent.* damages and costs.

J. B. Julian and *J. S. Newman*, for the plaintiff.

C. H. Test and *J. Perry*, for the defendant.

(1) See *McKinney v. Springer*, *ante*, p. 59.—*Manville v. McCoy*, *post*. *Contra Hoagland v. Moore*, 2 Blackf. 167, *Swift v. Williams*, 2 Carter's Ind. R. 365. See, also, *Cranmer v. Graham*, 1 Blackf. 406.

(2) The R. S. 1852, allow the defendant to set up in his answer any counter-claim arising out of the transaction set forth in the complaint as the ground of the plaintiff's claims, or any of them, and if he omits to set it up when he has been personally summoned, he cannot afterwards maintain an action therefor, except at his own costs. The counter-claim is defined to be any matter arising out of, or connected with, the cause of action, which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages. R. S. 1852, vol. 2, pp. 39, 41.

(3) The right to maintain an action under the circumstances stated in *Britton v. Turner*, cited in the text, is denied in *De Camp v. Stevens*, 4 Blackf. 24.

NICKLAUS v. ROACH and Another.

The taking of a judgment against one of two partners upon a partnership debt, discharges the other, at law, from the debt.

Where the partner thus discharged, being ignorant of the fact that such a judgment had been rendered, and confiding in the representations of the creditor that none had been, executed his note to the creditor for the debt, it was held, that a suit could not be maintained upon the note.

Wednesday,
November 26

APPEAL from the *Jefferson* Circuit Court.

BLACKFORD, J.—*Bryan Roach* and *Dennis Long*, partners, trading under the firm of *Roach and Long*, brought an action of debt in the *Jefferson* Circuit Court against *John Nicklaus*. The suit was commenced in 1849, and is founded on a promissory note given by the defendant to the plaintiffs. The note is as follows:

"\$135 78. *Madison*, April 2, 1849. Ninety days after

date, I promise to pay to the order of *Roach and Long* 135 dollars and 78 cents, with interest from date, for value received of them. Witness my hand the day and date above written. *John Nicklaus.*"

Nov. Term,
1851.

NICKLAUS
v.
ROACH.

The defendant pleaded in bar, substantially, as follows:

That on the 8th of *November*, 1847, the defendant and one *George Dapput* were partners, doing business under the name of *John Nicklaus and Co.*, and, as such partners, they became indebted to the plaintiffs in the sum of 747 dollars and 78 cents, for goods sold, work and labor, and money paid. That on the 20th of *June*, 1848, the defendant and said *Dapput*, still being partners as aforesaid, paid to the plaintiffs 612 dollars, parcel of said 747 dollars and 78 cents; leaving a balance due to the plaintiffs from the defendant and said *Dapput*, as partners as aforesaid, of 135 dollars and 78 cents.

That on the 6th of *July*, 1848, the defendant and said *Dapput* dissolved their partnership, and said *Dapput*, for a valuable consideration, agreed with the defendant to pay to the plaintiffs the said debt of 135 dollars and 78 cents; of all which the plaintiffs then had notice.

That on the 11th of *October*, 1848, on an account being stated by and between the plaintiffs and said *Dapput* of and concerning said last mentioned sum of money, and the interest thereon, there was found due to the plaintiffs from said *Dapput*, on account of that money and interest, the sum of 140 dollars and 55 cents, for which sum the said *Dapput* then gave to the plaintiffs his promissory note, which note the plaintiffs accepted and received for and on account of said 135 dollars and 78 cents and interest.

That up to the time of the giving of said note, the only evidence of said indebtedness was an open account kept by the plaintiffs with the defendant and said *Dapput*.

That afterwards, at the *October* term, 1848, of the *Bartholomew* Circuit Court, and before the commencement of this suit, the plaintiffs, in a suit on said note, recovered judgment against said *Dapput* for 140 dollars and 69

Nov. Term,
1851.

NICKLAUS
v.
ROACH.

cents with costs, which judgment remains in full force and unsatisfied.

That, afterwards, on the 2d of *April*, 1849, the plaintiffs represented to the present defendant that the said sum of 135 dollars and 78 cents, balance of the account aforesaid, was still unpaid, that they had not taken the note of said *Dapput*, nor recovered judgment against him, for said debt, nor settled the same in any other manner.

That at the time those representations were made, the present defendant resided about forty-five miles from where said *Dapput* resided and then was, and from where said judgment was rendered; and the defendant, relying on the truth of said representations, and supposing himself liable to pay said balance of 135 dollars and 78 cents to the plaintiffs, and in consideration of that balance, and for no other consideration, executed to the plaintiffs the note in the declaration mentioned.

That the consideration of the note now sued on was the same as, and was identical with, the consideration of the note given as aforesaid to the plaintiffs by said *Dapput*, except that the latter note included interest on the 135 dollars and 78 cents.

That, therefore, the note in the declaration mentioned was given without consideration. Verification.

The plaintiffs demurred to the plea. The demurrer was sustained; and final judgment rendered for the plaintiffs.

Whether the plea is valid or not is the only question in the cause.

The plea is in bar of a suit on a promissory note. The most important facts stated in the plea, are the following: The present defendant and one *Dapput* having, as partners, contracted a debt with the plaintiffs, dissolved their partnership. *Dapput*, afterwards, gave to the plaintiffs his own note for the amount of said debt and interest, which note the plaintiffs accepted for and on account of that debt. The plaintiffs then sued *Dapput* on his said note, and recovered judgment against him. The present defendant, afterwards, relying on certain false representa-

tions of the plaintiffs, gave them the note now sued on for said partnership-debt.

Nov. Term
1851.

NICKLAUS
v.
ROACH.

We are of opinion that this plea is valid, on the ground that the plaintiffs, by obtaining a judgment against *Dapput* on his note, which they had taken on account of the partnership-debt, had discharged the present defendant from that debt. The said partnership-debt, contracted by the present defendant and *Dapput*, must be considered, in a Court of law, as a joint debt, and not as a joint and several one. If one of two partners be sued for a partnership-debt, the defendant may plead in abatement the non-joinder of the other. That could not be done, if the debt was joint and several. The original debt, therefore, being joint only, the plaintiffs had but one cause of action for that debt, and could be entitled, of course, but to one judgment on that cause of action. Where the contract is joint and several, the law is otherwise: there the creditor may proceed against each debtor separately till the debt is satisfied. The doctrine, that where the debt is joint only, the creditor can have but one judgment, is very clearly settled in a late case in the *English* Court of Exchequer. There the plea to an action of debt stated, that the contract declared on was made by the plaintiff with the defendant and one *Smith*, and not with the defendant alone; and that the plaintiff had previously recovered a judgment against said *Smith* for the same debt. That plea was held, on demurrer, to be good. The Court there said—

“If there be a breach of contract, or wrong done, or any other cause of action by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result. Hence the legal maxim, ‘*transit in rem judicatam*’—the cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the

Nov. Term,
1851.

NICKLAUS
v.
ROACH.

higher. This appears to be equally true where there is but *one cause of action*, whether it be against a single person or many. The judgment of a Court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and the cause of action, being single, cannot afterwards be divided into two. Thus it has been held, that if two commit a joint tort, the judgment against one is, of itself, without execution, a sufficient bar to an action against the other for the same cause. * * * * * We do not think that the case of a joint contract can, in this respect, be distinguished from a joint tort. There is but one cause of action in each case. The party injured may sue all the joint tort-feasors or contractors, or he may sue one, subject to the right of pleading in abatement in the one case, and not in the other; but, for the purpose of this decision, they stand on the same footing. Whether the action be brought against one or two, it is *for the same cause of action*." *King v. Hoare*, 13 Mees. & Welsby, 494.

There can be no doubt, therefore, but that the plaintiffs in the present suit, by recovering a judgment against *Dapput* for the partnership-debt, discharged the now defendant from all liability for that debt.

But after the defendant was so discharged from the partnership-debt, he gave the note now sued on for the same debt. We must, therefore, inquire whether, although the defendant had been previously discharged, this suit will not lie.

We shall not extend this opinion by examining the question whether, had the plaintiffs not made the misrepresentation alleged in the plea, the suit could have been sustained. It is quite sufficient for the determining of this part of the case, merely to refer to that misrepresentation, which was, that the plaintiffs, at the time the note in question was given, falsely represented to the defendant that no judgment for the partnership-debt had been recovered against *Dapput*. The plea alleges that the defendant, relying on the truth of that representation and others, gave the note in question. That misrepresenta-

tion, being in relation to a material fact, and having induced the defendant to give the note for a debt from which he had been discharged, must be, at all events, a good bar to the present suit founded on that note.

Per Curiam.—The judgment is reversed with costs. Cause remanded, with instructions to the Circuit Court to permit the plaintiffs to reply to the plea.

J. W. Chapman, for the appellant.

J. Sullivan, for the appellee.

Nov. Term,
1851.

GORHAM
v.
REEVES.

GORHAM v. REEVES and Others.

Although a sealed note, given in part payment for certain real estate, be due before the time appointed for the execution of the deed, yet, if suit on the note be not commenced until after the time when the deed was to have been executed, the defendant may plead in bar of the action, that the plaintiff did not, on the day appointed by the contract, execute, or offer to execute, the deed.

To a suit by the payees of a promissory note, given in consideration of the conveyance of certain land by them to the maker, and commenced after the time appointed by contract for the execution of the conveyance, it is a sufficient defense to show that at the time when the conveyance was, by contract, to have been executed, the plaintiffs were not the owners of the land.

To a plea alleging such a defense, a replication that the plaintiffs, together with their wives, were the owners in fee of the land mentioned in the plea, but not averring that they were the owners at the time when the conveyance was to have been executed, is bad.

APPEAL from the *Hendricks* Circuit Court.

BLACKFORD, J.—This was an action of debt commenced in *March*, 1846, by *Reeves* and others against *Gorham*. The suit is founded on the following sealed note:

“On or before the 15th of *August*, 1840, I promise to pay *Caleb Reeves*, *Henry Sanders*, and *John Sanders*, 200 dollars, for value received. *November* 8th, 1838. *Thorton F. Gorham*, [seal].”

There are two pleas in bar. The first plea states that the note sued on, with others, was given in consideration that the plaintiffs would, on the 15th of *August*, 1841,

Wednesday,
November 26.

Nov. Term,
1851.

GORHAM
v.
REEVER.

execute to the defendant a good deed in fee-simple for a certain tract of land (describing it); that the plaintiffs, on the day said note was given, executed to the defendant a title-bond, conditioned that they would convey to him said land in fee on said 15th of *August*, 1841. This plea further states that the plaintiffs did not, on said 15th of *August*, 1841, execute or offer to execute to the defendant a conveyance, according to the tenor and effect of said title-bond, though the defendant was, on the last named day, and has thence hitherto continued to be, ready and willing to pay to the plaintiffs the amount of said note, if they would make him a good deed for said land, according to the tenor and effect of said title-bond. Verification.

There was a general demurrer to this plea, and the demurrer was sustained.

The second plea is to the following effect: That, at the time of making said note, the plaintiffs falsely and fraudulently represented to the defendant that they were the owners in fee of the land mentioned in the first plea; that, in consideration that the defendant would execute to the plaintiffs the note sued on, with two others, and pay them 100 dollars in cash, they agreed to convey said land to the defendant, in fee, on the 15th of *August*, 1841, and gave him a title-bond binding themselves to make such conveyance on that day. Averment, that the defendant, confiding in said false representations, gave the said note, with the others before mentioned, and paid said 100 dollars in cash, to the plaintiffs, as the consideration for said land; that the plaintiffs, at the time said note was executed, were not the owners, nor was either of them the owner, in fee, of said land, nor had they or either of them been such owners from thence hitherto. Verification.

Replication to the second plea as follows:

The plaintiffs, as to the second plea, say *precludi non*, because they say that they, together with their wives, were the owners in fee of the land in said plea mentioned. Conclusion to the country.

General demurrer to this replication, and the demurrer overruled. Final judgment for the plaintiffs.

The first question is as to the validity of the first plea.

Nov. Term,
1851.

The note sued on was payable on the 15th of *August*, 1840. The consideration of the note, as alleged by the plea, was that the plaintiffs would convey to the defendant, in fee, on the 15th of *August*, 1841, a certain tract of land. As the suit was not commenced until after the day when the conveyance was to have been made, the note could not be treated as an independent contract. *Cunningham v. Gwinn*, 4 Blackf. 341. The conveyance, as alleged by the plea, was not executed on said 15th of *August*, 1841, nor was it offered on that day according to the tenor and effect of the contract. This default on the plaintiffs' part, as shown by the plea, prevents their recovery on the note sued on; and the plea must be considered, on general demurrer, a good bar to the action. *McCullough et al. v. Dawson*, Smith's R. 245 (1).

GORHAM
v.
REEVES.

The next question is whether the replication to the second plea is valid.

The second plea shows the consideration of the note to be similar to that set out in the first plea; and it is alleged by the plea, not very formally to be sure, but in substance, that the plaintiffs were not the owners of the land on the 15th of *August*, 1841, when the deed was to have been made. See *Gorham v. Reeves et al.*, Smith's R. 239 (2). The replication in question, which states, in general terms, that the plaintiffs, with their wives, were the owners in fee of the land, without saying when they were such owners, is no answer to the plea. That replication would let in proof of the plaintiffs' ownership of the land at any time before the replication was filed. The replication, to have been valid, should have averred the plaintiffs' ownership of the land on the 15th of *August*, 1841, when, by their agreement, they were to have executed the conveyance. If they had no title to the land on that day, they could not comply with their contract, and had no right to recover, in this suit, on the note given in part payment of the purchase-money.

Nov. Term, 1851. *Per Curiam.*—The judgment is reversed with costs.
 Cause remanded, &c.
KINTNER *J. S. Harvey*, for the appellant.
 v.
 THE STATE. *C. C. Nave*, for the appellee.

(1) 1 Carter's Ind. R. 413.—(2) Id. 421.

KINTNER and Others v. THE STATE on the relation of SKELTON.

Debt by *The State* on the relation of *S.*, the school commissioner of *Cass* county, against *K.*, the former school commissioner, and his sureties, upon the official bond of *K.* The declaration showed that *K.* had been elected to the office for three terms successively, and up to the time of the relator's appointment; and the suit was upon the first bond of *K.* A breach alleged was that *K.*, during his first term, received from the sale of school lands, &c., divers large sums of money, which he wasted and converted to his own use during said first term, and that, although specially requested by the relator, as his successor as aforesaid, to pay the same to him, *K.* refused to do so. *Held*, that the breach sufficiently negatived a payment of the money by *K.* to his immediate successor, viz., himself.

In debt upon a bond with conditions, a general demurrer to the entire declaration will not be sustained, if one of several breaches assigned is sufficient.

In a suit upon the official bond of a school commissioner, after an interlocutory judgment for the plaintiff, the inquiry of damages was submitted, by agreement of the parties, to referees. *Held*, that the submission was authorized by the R. S. 1843.

In debt upon the official bond of *K.*, a school commissioner, and his sureties, for the wasting and converting by *K.* to his own use, during his term of office, of certain large sums of money derived from the sale of school lands, &c., the defendants produced the record of the board of commissioners, and a report of *K.*, showing a statement of his accounts with the several townships, which had been filed and recorded, and offered the same in evidence. *Held*, that the evidence was properly rejected.

In the suit upon said bond, breaches were assigned that *K.*, during his said first term, received from the sale of school lands, and for interest on the loan of school funds, divers large sums, &c., and that he refused to render an annual account of the moneys received and disbursed during his said term. After an interlocutory judgment for the plaintiff, the assessment of damages was submitted, by agreement, to the award of arbitrators. The award returned showed a specific amount found due from *K.* of principal and interest received, and paid into the hands of

K., on school lands sold and not accounted for, and of surplus revenue and interest received by *K.* and not accounted for; and the award also contained a separate assessment of damages in other cases against *K.* *Held*, that the award was sufficiently certain. *Held*, also, that it was not objectionable for containing the assessment of damages in other suits—that being mere surplusage.

A judgment upon the award of referees may properly include interest from the time of the award till judgment is rendered thereon.

Nov. Term,
1851.

KINTNER
v.
THE STATE.

ERROR to the *Cass* Circuit Court.

Friday,
November 28.

SMITH, J.—Debt by *The State* on the relation of *Skelton*, school commissioner of *Cass* county, against *Kintner*, *Ewing*, *Dale*, *Fitch*, *Heth*, and *Cradock*, on the official bond of *Kintner* as former school commissioner of the same county.

The declaration avers that *Kintner* was elected school commissioner at the *August* election in 1836, and on the 31st of *August*, 1836, he, with the other named defendants, and one *McBean*, who has since died, as his sureties, executed the bond sued upon.

The bond was for the sum of 20,000 dollars, and was conditioned that the said *Kintner* would “truly and faithfully discharge the duties of the office of school commissioner, for the county of *Cass* aforesaid, during his continuance in said office, and would, at the expiration of his term of service, pay over, to his successor in office, all moneys which might be, at that time, in his hands for the use of town schools in the said county, and which might come to his hands by virtue of his said office.”

There is a suggestion that the bond is defective in being for 20,000 dollars, when it should have been for 10,000 dollars, and that it should have been conditioned for the faithful discharge of the duties of his office, and for the delivery of all moneys and *papers* which might come to his hands. No question is, however, raised as to these defects.

It is averred that *Kintner* entered upon the duties of his office on the 3d of *September*, 1836, and continued in office, under said election, until *August*, 1839, when he was re-elected, and in *May*, 1840, executed another official bond; that he continued in office, under his second

Nov. Term,
1851.

KINTNER
v.
THE STATE.

election, until *August*, 1842, when he was again re-elected, and, in *September* following, filed a new bond; that he continued in office, under his third election, until the 23d of *August*, 1844, when he resigned, and *Skelton* was appointed his successor.

There are seventeen breaches assigned.

The first breach alleges that *Kintner*, during the period of his first term of office, received from the sale of school lands, and for interest on loans of school funds, divers large sums of money, which he wasted and converted to his own use during the said term, and that, although specially requested by *Skelton* to pay the same to him, as his successor, in 1844, he refused to do so.

The second breach alleges that he refused to pay said moneys, or any part thereof, to the township trustees, though said trustees annually drew drafts upon him for the interest belonging to the township.

The 3d, 4th, and 9th breaches were *non-prosed*.

The 5th, 6th, 7th, 8th, 10th, 11th, 12th, 13th, 14th, and 15th breaches are similar to the first, varying only in the amounts of the sums of money stated to have been received by *Kintner*.

The sixteenth breach alleges that *Kintner* failed to render an annual account of the moneys received and disbursed during his said term to the board of county commissioners.

The seventeenth, that he failed to keep a separate account of the moneys received by him as principal and interest.

There is a general averment at the close that the penalty of the bond remained unpaid.

At the *August* term of the Circuit Court in 1845, the defendants filed a general demurrer to the declaration, which was overruled, and the defendants declining to answer further, an interlocutory judgment was rendered and a writ of inquiry ordered.

At this stage of the case, it was agreed by the parties, in Court, that the inquiry and assessment of damages should be referred for adjustment and settlement to *Peter*

Anderson, Chauncey Carter, and Philip Pollard; referees, mutually chosen by the parties, and that their report or award should be returned at the next term of the Court, and should be deemed and taken of the same effect as the verdict of a jury.

Nov. Term,
1851.

KINTNER
v.
THE STATE.

Said referees accepted the appointment, and were duly sworn; and it was agreed by the parties that they should meet on the second *Monday of June* next ensuing, should have power to adjourn from time to time, and should make their report at the next term.

At the *February* term, 1846, the parties appeared, but the referees having failed to make a report, by agreement, the time for making a report was extended to the next term.

At the succeeding *August* term, by agreement of the parties, the time for making a report was again extended.

At the next ensuing term the referees reported as follows:

"The undersigned, *Peter Anderson, Philip Pollard, and Chauncey Carter*, appointed by your Court, at the *August* term thereof, in the year 1845, to assess the damages in three several suits or judgments, wherein the *State of Indiana*, on the relation of *John O. Skelton*, school commissioner, is plaintiff, and *James Kintner* and others are defendants, and subsequently reappointed at the *February* and *August* terms, 1846, respectfully report that they have discharged that duty to the best of their judgment and ability, and do hereby award and assess the amount due from the said defendants to the school fund of the county of *Cass* as follows:

"On the bond executed as school commissioner by the said *Kintner* and his securities, on the 31st day of *August*, 1836, there is due for principal received and paid into the hands of said *Kintner*, on school lands sold and not accounted for, the sum of 1,046 dollars and 82 cents, the interest on which amount is 471 dollars and 7 cents. Also, that there is due as aforesaid the sum of 1,637 dollars and 7 cents, being the amount of surplus revenue and interest received by said *Kintner* and not accounted

Nov. Term,
1851.
KINTNER
v.
THE STATE.

for, making, in all, the sum of 3,154 dollars and 96 cents, the amount due on the first bond, dated August 31st, 1836."

Here follow further awards of sums due on the two other bonds, after which the report concludes as follows:

"The undersigned further state that, in the estimates which produce the results above stated, they did not undertake to judge of the legality of any loans made by said commissioner, but allowed and passed to the credit of said *Kintner*, as commissioner, all the securities or evidences of loans delivered by said *Kintner* to his successor or to the county auditor, except one note of hand said to have been executed by said *Kintner* and *Joseph Douglass*, on the 10th of July, 1836, for the sum of 331 dollars and 93 cents, which note is now in the hands of the present school commissioner or any other officer of the county, (of which the undersigned have no evidence,) should be delivered to said *Kintner*, he having been charged with the amount of the same in the foregoing settlement. All of which is respectfully reported. March 1st, 1847."

After this report was filed, the cause was continued to the October term, 1848, when the plaintiff entered a *remittitur* as to so much of the award as included the amount of the note made by *Kintner* and *Douglass*, with the interest, making, in all, 544 dollars and 39 cents, and the Court ordered a credit to that amount to be entered on the award.

The defendants then made a motion to have the award set aside, which was overruled, and a judgment was rendered against the defendants for 2,871 dollars and 63 cents, which sum was found by deducting the amount remitted and adding interest on the balance from the time of the award to the date of the judgment.

Several objections are raised by the plaintiffs in error to the proceedings in this case.

They contend that the Court below erred in overruling the demurrer to the declaration, on the ground that no sufficient breaches are assigned. The objection made to

those breaches, which aver a receipt of school funds by *Kintner*, during the term of office for which the bond sued upon was given, and that he wasted and converted those funds to his own use, during said term, is, that they do not negative a payment over to his immediate successor, that is, to himself, after he was re-elected. Such an averment was not necessary. It is averred that he wasted and converted said money, during his then term of office, and this sufficiently negatives any legal settlement or accounting therefor, which would have amounted to a faithful performance of his duties during that term. If, upon the trial, it had been proved that he faithfully accounted, in any manner, for all the money received, during his first term, after his re-election, the averments in these breaches would not have been sustained. But the securities upon the bonds, given by him, on being re-elected the second and third time, would not be answerable for defalcations which occurred wholly during previous terms. Some of these breaches, at least, are sufficient, and as the demurrer is a general one to the whole declaration, it was rightly overruled.

Nov. Term,
1851.

KINTNER
v.
THE STATE.

The next objection is, that the inquiry of damages, after an interlocutory judgment, could not be legally submitted to referees. We think the statute authorized such a reference by consent of the parties. R. S. c. 45, s. 22, p. 791.

One of the reasons assigned by the defendants in the Court below, in support of their motion for setting aside the award, was the following :

"That said *Kintner*, on the 9th of May, 1840, reported the situation of the funds in his hands, to the commissioners of *Cass* county, and, previous to said time, had been re-elected to said office and filed his official bond, and, at the day aforesaid, there was no default by said *Kintner*."

The record of the county commissioners was produced, and a report of *Kintner*, showing a statement of his accounts with the several townships, which had been filed and recorded, was offered in evidence, but was

Nov. Term,
1851.

KINTNER
v.
THE STATE.

rejected by the Court. There can be no doubt that this report was properly rejected. Without proof of the items contained in it, it could not have been used, at any stage of the proceedings, as evidence for the defendants.

Several objections are made to the form and contents of the award, all of which, we think, are untenable. The report contains some superfluous recitals, perhaps, but the award made is sufficiently certain and explicit as to the matters involved in this suit, and if the parties chose to submit to the referees the adjustment of the accounts of *Kintner* in two other suits, there can be no reasonable objection to the award because the report contained, also, the damages assessed in those suits.

The judgment is objected to because interest was added to the amount of the sum awarded. This objection is, also, untenable. If a judgment had been rendered at the time the award was made, interest would have accrued upon it as a matter of course. The defendants, therefore, are not injured by the addition of such interest, while it would be clearly unjust to the plaintiff to compel him to lose the interest on his debt during the delay caused by the motions of the defendants.

Per Curiam.—The judgment is affirmed with 2 per cent. damages and costs.

O. H. Smith and *S. Yandes*, for the plaintiffs.

J. Sullivan and *D. D. Pratt*, for the defendants.

KINTNER and Others v. THE STATE on the Relation of SKELTON.

ERROR to the *Cass* Circuit Court.

SMITH, J.—This was an action of debt brought by *The State* on the relation of *Skelton*, school commissioner, against *Kintner*, *Heth*, *Coulson*, and others, on the official bond of *Kintner*, as former school commissioner, executed on the 3d of *March*, 1840.

The same errors are assigned as in the next preceding case, and the judgment must be affirmed for the reasons given in that case.

Nov. Term,
1851.

THE STATE
v.
BURTON.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

J. W. Wright, O. H. Smith, and S. Yandes, for the plaintiffs.

D. D. Pratt, for the defendants.

THE STATE v. BURTON.

A county treasurer who exacts and receives from a tax-payer a fee as for a distress and sale of his goods for taxes, when none have actually been made, is guilty of extortion.

ERROR to the *Franklin* Circuit Court.

Friday,
November 28.

SMITH, J.—This was an indictment against the defendant in error for extortion. The charge is, that on the 5th day of *January*, 1850, at, &c., the defendant, being the treasurer of said county of *Franklin*, did unlawfully, extortiously, and by color of his office, extort, demand, and receive from one *Michael Owens*, the sum of 35 cents as and for a fee due him as such treasurer, for making distress and sale of goods and chattels of the said *Owens* for the payment of taxes then due the said state and county, whereas, in truth, and in fact, no distress and sale of the goods and chattels of the said *Owens* for the payment of taxes had been made, and no fee whatever was then due from said *Owens* to the defendant. The indictment was quashed on the defendant's motion.

The defendant in error contends that he had a right to exact the fee charged in the indictment, before and without a distress and sale, as the fees allowed a constable for serving and returning an execution. He claims this right under the statute regulating fees contained in the Revised Code of 1838, p. 296, and the 56th and 59th

Nov. Term, sections of chapter 12, in the Revised Code of 1843, p.
1851. 218.

THE STATE
v.
BURTON.

By the 56th section above referred to, and which has been amended, as to time, by a subsequent statute, it is enacted that in case any person shall neglect or refuse to pay the tax imposed on him, the county treasurer shall, after the 1st day of *January*, levy the same and the costs and charges that may accrue, by distress and sale of goods and chattels, &c. The 59th section is as follows:

"The treasurer shall be allowed the same fees and charges, except mileage, for making distress and sale of goods and chattels for the payment of taxes, as may be allowed by law to constables for making levy and sale of property on execution."

The statute regulating fees and salaries, authorizes a constable to charge 25 cents for serving an execution, and 10 cents for returning the writ, and the defendant insists he had the right to make similar charges for taxes collected after the 1st day of *January*. The case of *Roop v. The State*, 1 Blackf. 323, is cited in support of this position. In that case an execution was delivered to a constable, who called on the execution-debtor, and collected the money without levying on any property; and it was held that this was a sufficient service of the execution to authorize the constable to charge the fee of 25 cents.

But we do not think that case is analogous to the one now before us. Where a constable collects money on execution without making a sale, he is entitled to charge only half the commissions chargeable when a sale is made, but the treasurer receives his regular commissions for collections, in all cases; and the 59th section, above quoted, seems to contemplate that he shall receive additional compensation for his services only when he is required to perform additional labor. No execution is placed in the treasurer's hands, unless the duplicate tax-list could be so considered, and this, certainly, does not require a service and return like an execution. It serves to determine the amount of taxes due by the persons whose names are contained in it, and if such taxes are

not paid before a certain date, the treasurer is authorized to collect the same by distress and sale. If he is actually required to make a distress and sale, in order to collect such taxes, the law provides that he shall have compensation for so doing, but we can perceive no good or even plausible grounds for considering the mere receipt of taxes, after the 1st day of *January*, as a constructive service and return of the duplicate, similar to that required of a constable having an execution in his hands.

We are, therefore, of opinion that the fees alleged to have been exacted by the defendant in this case were illegal, and that the Circuit Court erred in quashing the indictment.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Wallace, for the state.

G. Holland, J. Ryman, J. A. Matson, and J. D. Howland, for the defendant.

Nov. Term,
1851.

THE STATE
v.
BURTON.

THE STATE v. BURTON.

ERROR to the *Franklin* Circuit Court.

SMITH, J.—This was also an indictment against *Benjamin Burton* for extorting illegal fees from one *Roop*. The case is precisely similar to the preceding one, and the judgment must be reversed for the same reasons there given.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Wallace, for the state.

G. Holland, J. Ryman, J. A. Matson, and J. D. Howland, for the defendant.

Nov. Term,
1851.

KENWORTHY
v.
TULLIS.

3 99
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KENWORTHY v. TULLIS and Another.

A deed of conveyance was as follows: "This indenture, &c., witnesseth, that *M. H.*, in consideration of, &c., paid, &c., by *L. K.*, hath granted, bargained, sold, and conveyed, and, by these presents, doth grant, bargain, sell, and convey unto the said *L. K.*, the free privilege to enter upon a certain tract or piece of land claimed, owned, and held by the said *H.*, being, &c., (describing it,) and to dig a race, a mill-pit, and tail-race, to the creek; to erect a saw-mill and occupy the same forever; and, likewise, to cut and remove any timber that may be in the way of digging, building, and occupying said mill; the said *L. K.* not committing any unnecessary waste of timber on said land belonging to said *H.*, and said *K.* to commence and finish said mill as soon as practicable; and the said *M. H.* doth hereby bind himself, his heirs, &c., to ratify and confirm to the said *L. K.*, his heirs, and assigns forever, the aforesaid privilege to enter on said land, to dig, build, and occupy as aforesaid forever, and to hold the same for his own proper use and behoof, free from rents or any other claim forever." Here followed certain covenants of warranty. *Held*, that the part of the deed above recited conveyed the mill privilege and premises described therein, to *K.* and his heirs, in fee-simple.

The clause recited, saying, "the said *M. H.* doth hereby bind himself, his heirs," &c., "to ratify and confirm to the said *L. K.*, his heirs, and assigns, the aforesaid privilege," &c., does not appear to have been intended to operate as a *covenant*, but to constitute a part of what, in a more formally drawn instrument, would be called the *habendum* and *tenendum*.

The thing, and the estate granted by a deed, may be granted either by words contained in the *premises*, or in the *habendum* and *tenendum*.

Friday,
November 28.

ERROR to the *Tipppecanoe* Court of Common Pleas.

SMITH, J.—Trespass *quare clausum fregit* by the appellant against the appellees. The first count alleges that the defendants broke and entered the close of the plaintiff, put him out of possession, and deprived him of the use and occupation of it. The second count charges that the defendants dug a certain mill-race and mill-pit, and erected certain mills upon the said close, thereby encumbering it, &c. Plea, the general issue; with an agreement that all legal matters of defense, which might be given in evidence under any form of pleadings, should be admitted. The judgment was for the defendant.

The evidence was as follows:

In October, 1831, *Moses Hockett* was the owner of the

land described in the declaration, and executed to *Lewis Kiser*, who died in 1847, the following deed:

Nov. Term,
1851.

KENWORTHY
v.
TULLER.

"This indenture, made," &c., "witnesseth, that the said *Moses Hockett*, of the first part, for and in consideration of the sum of 10 dollars, to him in hand paid by the said *Lewis Kiser*, of the second part, the receipt whereof the said *Moses Hockett* doth hereby acknowledge, hath this day granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, and convey, unto the said *Lewis Kiser*, the party of the second part, the free privilege to enter upon a certain tract or piece of land claimed, owned, and held by the said *Hockett*, being," &c., (here describing it,) "and to dig a race, a mill-pit, and tail-race to the creek, to erect a saw-mill and occupy the same forever, and likewise to cut and remove any timber that may be in the way of digging, building, and occupying said mill, the said *Lewis Kiser* not committing any unnecessary waste of timber on the said land belonging to the said *Hockett*, and said *Kiser* to commence and finish said mill as soon as practicable; and the said *Moses Hockett* doth hereby bind himself, his heirs, executors, administrators, and assigns, jointly and severally, to ratify and confirm to the said *Lewis Kiser*, his heirs, and assigns forever, the aforesaid privilege to enter on said land, to dig, build, and occupy as aforesaid forever, and to hold the same for his own proper use and behoof, free from rents or any other claim forever. And the said *Moses Hockett* doth, for himself, his heirs, executors, administrators, and assigns, put the said *Lewis Kiser* into the full, free, and peaceable possession of the aforesaid privilege. And from all persons claiming under him, and from all other claims whatsoever, the said *Moses Hockett* the said *Lewis Kiser*, his heirs, and assigns, in the free use of the aforesaid privilege forever, will warrant and defend. In testimony whereof," &c.

In April, 1849, *Hockett* conveyed the tract of land upon which this mill-privilege was situated, to *Kenworthy*, the plaintiff in this suit. In the deed to *Kenworthy*, "a certain water-privilege granted to *Lewis Kiser*" is excepted.

Nov. Term,
1851.

KENWORTHY
v.
TULLIS.

The fee-simple interest of the said mill-privilege was proved to be of the value of 75 dollars. In the fall of 1849, the defendants below, who were the heirs at law of *Lewis Kiser*, entered upon the said lands, and rebuilt and occupied the mill which had been erected by *Kiser* in his lifetime.

The appellees contend that the deed from *Hockett* to their ancestor conveyed the mill-privilege and premises in question, to him and his heirs in fee-simple, and the Court below gave it this construction in its charge to the jury.

The appellant insists that a life estate only was conveyed to *Kiser*. His counsel argue that the words of inheritance necessary to convey a fee-simple estate are wanting in those parts of the deed technically called *the premises*, and the *habendum* and *tenendum*, and that the estate described in these parts cannot be enlarged by words of inheritance used in the *covenants* or *warranties*.

In the deed now in question, the word "*heirs*" is used in two places. First, in that clause which says "*the said Moses Hockett doth hereby bind himself, his heirs,*" &c., "*to ratify and confirm to the said Lewis Kiser, his heirs,*" and assigns, the aforesaid privilege," &c.; and secondly, in the general warranty. It will be observed that in the clause first above mentioned, the words "*ratify*" and "*confirm*" are not used in reference to the estate or interest in the thing previously granted, but to the thing itself, that is, the privilege to enter upon the land, &c. The person who drew the deed was probably ignorant of the technical meaning of those words, and intended only by the repetition in this clause of the privileges granted, to cover any defects he may have made in the previous wording of them. It is obvious that the instrument was drawn up by an inexperienced hand. There are none of the formal parts of a deed which can be distinctly separated, except the warranty at the close. But it is not necessary that a deed should have these formal parts. There are many valid deeds which contain nothing more than what is usually contained in the premises. The

clause in this deed, above mentioned, does not appear to have been intended to operate as a *covenant*, but rather to constitute a part of what, in a more formally drawn instrument, would be called the *habendum* and *tenendum*. It is, therefore, unnecessary to resort to the warranty for the words required to convey an estate in fee-simple. They are found in the previous clause, and whether that clause be considered as a part of the *premises*, or of the *habendum* and *tenendum* is immaterial, as the agreements respecting the estate, and the thing granted, may be contained in either. 2 Black. Comm. c. 20, Tit., *Deed*.

Nov. Term,
1851.

BURTON
v.
ELLIOTT.

We think, upon an examination of the whole instrument, there can be no difficulty in determining that it was the intention of the parties a fee-simple should be conveyed, and, as that intention may be carried into effect without violating any rule of law relative to the words necessary to be used, we think the instruction given was right.

Per Curiam.—The judgment is affirmed with costs.

Z. Baird, for the plaintiff.

R. C. Gregory, for the defendants.

BURTON and Others v. ELLIOTT.

A conveyance of land by father to son, without a valuable consideration, and for the purpose of defrauding existing creditors, is void as against such creditors, but valid between the parties; and, where the lands have descended to the heirs of the grantee, a Court of chancery will, upon the application of such creditors, set aside the sale as to them, and order the land to be sold to pay their claims and costs; and the heirs of the grantee will be entitled to the surplus.

APPEAL from the *Knox* Circuit Court.

Friday,
November 28.

PERKINS, J.—This was a bill in chancery by *William Burton* and four others against *Naomi Jane Elliott*, to set aside a fraudulent conveyance. The bill sets forth that one *John Elliott* was indebted in certain specified amounts,

Nov. Term,
1851.

BURTON
v.
ELLIOTT.

to each of the complainants; that judgments had been obtained upon the amounts, and that executions had issued, upon which returns of no property had been made, &c. The bill further states that, during the time said *John Elliott* was thus indebted to the complainants, he was the owner of a certain piece of land encumbered by a mortgage, and that, to defraud his creditors, he conveyed said land to his son, *Samuel H. Elliott*; that said *Samuel* afterwards died, leaving one son, to whom said land descended; that the son died, and from him the land descended to his mother, the wife of said *Samuel*, deceased, while living, *Naomi Jane Elliott*, the defendant. The bill prays that the conveyance from *John* to *Samuel H. Elliott* be set aside, and the equity of redemption sold to pay the complainants' claims. The defendant answered, denying material parts of the bill. Depositions were taken; the cause was heard upon bill, answer, exhibits, and depositions; and the bill was dismissed.

No motion was made to suppress any part of the depositions, nor is any one of them objected to here. The question is alone upon the evidence. Without recapitulating it, we may say that, in our opinion, it establishes, in connection with the exhibits and admissions in the pleadings, that *John Elliott* owed the debts, amounting to a considerable sum, named in the bill; that he, also, while owing them, owned the land described in the bill; that the land was encumbered with a mortgage of about 500 dollars, but was worth, probably, 1,000 dollars; at all events, a considerable sum over and above the amount of the mortgage; and that this land, *John Elliott* conveyed to his son, *Samuel H. Elliott*, subject to said mortgage, without consideration, and to defraud his creditors.

We think, therefore, that the Court below erred in dismissing the bill, and that, instead thereof, a decree should have been entered for the setting aside, so far as creditors are concerned, of said deed from *John* to *Samuel H. Elliott*, and for the sale of the equity of redemption in said land; thus giving the creditors of said *John* the benefit of whatever his interest in said land was worth. But as

said *John's* conveyance, though fraudulent as to creditors, was binding as against him and his heirs, it should further be decreed that if any surplus remains of the proceeds of the sale of said land, after paying all creditors and costs, it should be paid over to the person entitled under his grantee.

Per Curiam.—The decree is reversed with costs. Cause remanded with instructions to the Circuit Court to render a decree in conformity with this opinion.

S. Judah, for the appellants.

R. N. Carnan, for the appellee.

Nov. Term,
1851.

WRIGHT
v.
BLACHLEY.

WRIGHT v. BLACHLEY and Others.

If one of several instalments of purchase-money for land, be payable before the deed is to be made, it is no defense to a suit brought by the payee to recover such instalment, before the time appointed for the execution of the deed, that the payee had no title to the land at the time when the contract of sale was made.

Where a title-bond for the conveyance of land is silent as to the time when the obligee is to have possession, the latter is not entitled to the possession before the time of receiving his deed.

ERROR to the *Hendricks* Circuit Court.

Friday,
November 28.

PERKINS, J.—*Blachley, Strong, and Simpson* sued *William P. Wright* in assumpsit upon two promissory notes. *Wright* pleaded the general issue, and a want of consideration. Issues of fact were formed. The cause was submitted to the Court upon the following statement:

"It is agreed in this case that the defendant executed and delivered said notes to said plaintiffs, as in the declaration mentioned; that said notes were given as follows: On the 12th of *March*, 1841, one *Eden Bales*, who was the owner in fee of the lands described in the defendant's plea of want of consideration, being indebted to the plaintiffs, gave them his notes for 136 dollars, upon which they afterwards, on the 4th day of *October*, 1842, obtained a

Nov. Term,
1851.

WRIGHT
v.
BLACKLEY.

judgment for 136 dollars and 20 cents, said *Bales* still being the owner in fee of said lands; that afterwards, by virtue of an execution on said judgment, the sheriff of *Hendricks* county levied on the lands, and, on the 6th of *June*, 1846, sold them, after due notice, at the court house door of said county, when and where said plaintiffs became the purchasers, at the sum of 250 dollars, receiving a deed from the sheriff in due form of law therefor; that, afterwards, on the 5th day of *October*, 1846, said plaintiffs sold said lands to the defendant, *Wright*, at the price of 350 dollars, receiving his three several notes of that date, in amounts making said aggregate sum; two of which notes are those now in suit, the third not having fallen due at the commencement or trial of this action; and, at said sale, executing, also, to said defendant, *Wright*, a bond for a deed on payment of all of said notes; that said lands were appraised, on the 19th day of *May*, 1843, in accordance with the requirements of the R. S. of that year, at 500 dollars, being by two appraisers sworn by the sheriff; and that said defendant was in possession of said lands, at the date of said sale, by virtue of a purchase and deed from said *Bales*, subject to said plaintiffs' judgment. *J. L. Ketcham*, for plaintiffs. *C. C. Nave*, for defendant."

The Court below gave judgment for the plaintiffs for the amount of the two notes in suit, and interest.

The appraisement preceding the sheriff's sale above mentioned, not having been made pursuant to the law at the date of the contract between the plaintiffs below and *Bales*, was void. It was, in law, no appraisement. That sale must, hence, be treated as one made without an appraisement when the law required one, and, consequently, as void against *Bales*; *Harrison v. Stipp*, 8 Blackf. 455; and, perhaps, as against the defendant, *Wright*, though as to this we need not decide. The plaintiffs below, therefore, when they made the contract of sale of the lands in question, to said defendant, may have had no title; and the defendant insists, as the ground of his defense of want of consideration, that such is the fact.

But, conceding this to be the case, for the sake of the argument, is a defense to the notes made out? The time when, by the contract, a title was to be conveyed to said *Wright*, had not arrived at the commencement or trial of this suit. The case, then, is that of a sale, or rather of a contract for the sale, of land, where an instalment of the purchase-money falls due some time before the deed is to be made, and is, also, sued for before that time. In such a case, the payment of the instalment is an obligation not dependent on the making of a deed, and no deed need be tendered before suit brought. The conveyance of the land is not the consideration of the promise to pay the instalment, but the obligation, or promise, to convey it at a future day. *Leonard v. Bates*, 1 Blackf. 172.—*Cunningham v. Gwinn*, 4 id. 341.—*Gorham v. Reeves*, at this term of the Court (1). A defense, therefore, in the suit before us, was not established, even supposing said plaintiffs to have had no title at the time they contracted a sale, if said contract was itself a valid one.

Nov. Term,
1851.

WRIGHT
v.
BLACKLEY.

A man cannot sell and convey that to which he has no title; but that a contract for the conveyance to another at a future day, of property to which the seller, at the time of such contract, has no title, is valid, is decided in *Hibblewhite v. McMorine*, 5 M. and W. 462, and in *Wilks v. Smith*, 10 id. 355. The title-bond of the plaintiffs below, in this case, amounted, in substance, as we have said, but to such a contract. It contained no stipulation for possession; and, under such a bond, the obligee is not entitled to possession prior to receiving his deed. *Holmes v. Schofield*, 4 Blackf. 171.—*Doe v. Brown*, 7 id. 142.

But, again, said plaintiffs had a claim upon the land mentioned above, at all events, in the lien of their judgment. That lien they could enforce by a re-sale of the property, if the sale had been invalid. The deed which they had contracted to make would estop them from asserting that lien, and bind them to protect the grantee from it. The defendant below had purchased the land of the judgment-debtor subject to said judgment, and the

Nov. Term, 1851. removal of that encumbrance may be a good consideration for the notes given.

DOE
v.
HARVEY. *Per Curiam.*—The judgment is affirmed, with 1 *per cent.* damages and costs.
C. C. Nave, for the plaintiffs.

(1) See *ante*, p. 83.

DOE on the Demise of HARKRIDER and Others v. HARVEY.

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An administrator's sale of real estate for the payment of debts, made by an order of the Probate Court, is not void from the circumstance that the record does not disclose that notice of the application to sell was given to the heirs.

Notice in that case will be presumed.

A sale of land by an administrator for the payment of debts, will not be set aside, at law, because the administrator himself became the purchaser.

Friday,
November 26.

ERROR to the *Henry* Circuit Court.

PERRINS, J.—Ejectment by the heirs of *Philip Harkrider* against *Benjamin Harvey*, for a tract of land in *Henry* county. Judgment below for the defendant.

Harvey derived title through mesne conveyances from an administrator's sale made by order of the Probate Court of said *Henry* county, at its *May* term, 1833. The plaintiff insists that the Court, on the trial of this cause, should have declared that sale void: 1. Because it did not affirmatively appear that notice of the application for the sale was given to the heirs; 2. Because it did appear that the administrator upon said *Harkrider's* estate, was the purchaser at said administrator's sale. These are the only defects claimed to exist.

As to the first point, it is shown that a report was made to the Probate Court, stating the insufficiency of personal assets to pay the debts; that a petition by the administra-

tor for the sale of the land was filed, and an order made thereon for the issuing of process, and for the publication in the proper newspaper of notice to the heirs, and that the cause was thereupon continued to the next term of the Court. At a subsequent term, it appears, an order of sale was made. It was proved that notice of the sale was given, and that the sale was regularly made. The report of the sale to the Court, the confirmation thereof, the order for a deed, the deed and the approval of it by the Court, and the accounting for the proceeds of the sale, all regularly appear of record. Such being the facts, the point under consideration is settled by previous decisions of this Court. In *Horner v. Doe*, May term, 1848 (1), it was decided that where the record of a domestic Court of general jurisdiction was silent on the subject, and disclosed nothing inconsistent with the fact of notice having been given, notice, in the absence of proof to the contrary, would be presumed; and in *Doe v. Smith*, November term, 1849 (2), it was determined that the Probate Courts of this state were domestic Courts of general jurisdiction.

Upon the second point. An administrator is regarded as a trustee; and it has often been decided by this Court, that a purchase by a trustee, at his own sale, of the property of his *cestui que trust*, is so far void, in equity, that the latter may, in general, have it set aside without other cause shown than the single fact that the purchase was made by his trustee; the purchaser being allowed, on the vacation of his purchase, his payments, interest, and improvements. *Brackenridge v. Holland*, 2 Blackf. 377.—*Gage v. Pike*, Smith's R. 145 (3).—*Shaw v. Swift*, id. 398 (4). Such is the law. Hill on Trustees, 535. In *Brackenridge v. Holland*, *supra*, it is said: "A trustee, no matter how or from whom he derives his authority, cannot purchase the trust estate so as to make a profit to himself. There is no general rule that he shall not be a purchaser, but if he is, his purchase is for the benefit of the *cestui que trust*." An administrator, then, on his purchase, at his own sale, of the real estate of his intestate, holds it as a trustee of the heirs. A trustee has the legal title, and that is suffi-

Nov. Term,
1851.

Doe
v.
Harvey.

Nov. Term,
1851.

DOR
v.
HARVEY.

cient for the maintenance of possession. Of that possession, he cannot be ousted by an action of ejectment, unless his purchase can be set aside in that suit. We have found no case where such a purchase has been held void at law, and there seem to be weighty reasons why it should be set aside only in equity. All the cases on the subject hold that the *cestui que trust*, after a re-exposure of the property to sale, and a failure to obtain a better or an equal bid, has a right to hold the trustee to his purchase. All of them, also, hold that if the purchase is finally vacated, the trustee is entitled to be reimbursed his money paid, interest, and improvements. In *Michaud v. Girod*, 4 How. U. S., it was so decided. That was a case in chancery. For these he should hold a lien. These are matters for equitable adjustment, and the lien can only be enforced in chancery. They should, therefore, to save litigation, as well as for other causes, be settled in the proceeding in which the purchase is to be set aside, or affirmed, as the case may be. If the *cestui que trust* were permitted to avoid the purchase, at law, it would deprive him of the option of re-affirming it on his failure to make a better bargain elsewhere, and might jeopard the security of the trustee. In *Jackson v. Van Dalfsen*, 5 John. R. 48, it was held that such a purchase could not be declared void at law, where the objection was raised by a third person; and in *Davoue v. Fanning*, 2 John. Ch. R. 252, chancellor *Kent* seems to regard the law as being the same in all cases. He says: "The Supreme Court, in *Jackson v. Van Dalfsen*, *supra*, admit it to be a well settled rule in equity, that a trustee or agent to sell, shall not, himself, become the purchaser, and they very properly refer the remedy of the *cestui que trust*, in such cases, to the cognizance of chancery."

Per Curiam.—The judgment is affirmed with costs.

C. H. Test and *C. C. Nave*, for the plaintiff.

J. S. Newman, for the defendant.

(1) 1 Carter's Ind. R. 130.—(2) Id. 451.—(3) *Sturdevant v. Pike*, id. 277.
—(4) Id. 565.

JONES, Administrator of SHULTZ, v. VAN PATTEN.

Nov. Term,
1851.JONES
v.
VAN PATTEN.

After the transcript of a record has been filed in the Supreme Court, the Court below may correct a clerical error in the record, and upon the correction being properly certified to the Supreme Court, it will become part of the record of the latter Court.

The measure of damages for the violation of a simple contract, where vindictive damages are not authorized, is the amount necessary to have put the party injured in as good a condition when the contract was broken as if he had not made the contract.

Exceptions to the admissibility of evidence will not be regarded by the Supreme Court, in a civil action, unless they appear, by the record, to have been taken before the jury retired to deliberate upon their verdict.

Exceptions to the instructions of the Court to the jury, will not be noticed in the Supreme Court, unless they appear, by the record, to have been taken before the jury delivered their verdict.

ERROR to the *Tippecanoe* Court of Common Pleas.

Friday,
November 28.

PERKINS, J.—*Frederick Van Patten* sued *William Shultz* in an action of assumpsit, on the following instrument:

"This article of agreement, made this 28th day of *January*, 1848, between *Frederick Van Patten*, of the first part, and *William Shultz*, of the second part, witnesseth, that said *Frederick Van Patten* binds himself to furnish a good sound flat-boat, with a pilot and six able bow-hands, for the purpose of boating corn down the *Wabash*, *Ohio*, and *Mississippi* rivers, to said *William Shultz*; and said *Shultz* shall pay to said *Van Patten*, for each and every bushel delivered at any point on said rivers, designated by said *Shultz*, a freight of 18 cents per bushel; said flat-boat not to be loaded to draw over 44 inches of water. Said *Shultz* shall have, also, the privilege of choosing the pilot for said boat; the boat to be furnished with a second floor and to be sided up, on the inside, to keep the corn from the outside plank. The boat to be ready for loading as soon as the river is high enough to run her with safety, and to receive her load two miles below *Granville*. After having discharged her cargo, the boat and skiff shall be sold to the best advantage, and, should the proceeds amount to more than 50 dollars, said *Shultz* shall have the surplus. As soon as the boat has received her load-

Nov. Term,
1851.

JONES
v.
VAN PATTEN.

ing, said *Shultz* shall advance to said *Van Patten* the sum of 50 dollars, to be applied towards the payment of the freight. (Signed,) *Wm. Shultz, F. Van Patten.*"

The declaration contained two counts, and alleged that, though the plaintiff provided the boat, &c., the defendant refused to furnish the loading for the trip, &c. At the first term after the suit was commenced, the defendant appeared and pleaded the general issue to the first count, and filed a general demurrer to the second. The Court overruled the demurrer, which was then withdrawn; and an order was made that the defendant do plead to said second count, and that the plaintiff have leave to amend his declaration, and that the cause stand continued to the next term of the Court. At the next term, the plaintiff amended his declaration by adding the common counts, and the defendant, for plea to the second and the common counts, amended his plea of the general issue so as to make it applicable to the whole declaration, but this amendment was not noted by the clerk and did not appear upon the record, nor did the filing of the amended plea. The parties, however, both supposing the issue was made upon a denial of the whole declaration, tried the cause by a jury, giving evidence in the cause generally, and the jury found a general verdict for the plaintiff. The cause was brought into this Court; but the clerk of the Court of Common Pleas, not having noticed the filing of the defendant's amended plea of the general issue, the cause appeared by the record to have been tried, as to a part of the declaration, without an issue. Application was made to have the record amended in this Court, but the application was refused, not because it was deemed an amendment that should not be made, but because it was considered that the facts stated in the affidavit upon which the application was based, might, if they occurred, be within the knowledge of the Court below, and that, hence, it seemed most appropriate that the application should be made there. The affidavit spoken of was accordingly withdrawn from this Court, and an application made in the Court of Common Pleas for the

correction of the record. That Court made the correction, and properly, as the error was clerical. That amendment has been filed in this Court, as a part of the record of the cause, and it now stands before us, therefore, free from the objection which existed before the amendment was made.

Nov. Term,
1851.

JONES
v.
VAN PATTEN.

The Court gave, among others, the following instructions to the jury:

"Should you come to the conclusion that the plaintiff has performed [offered to perform, the Court meant,] his part of the agreement, and that no subsequent agreement, arbitration, or award, has been made between the parties, waiving or doing away with the written contract, then it may become material for you to consider the question of damages. It would be proper evidence on the part of the defendant, to show, in mitigation of damages, that, after the refusal of *Shultz* to load the boat, the plaintiff might still have got a load of some other person. Whether the defendant has shown that the plaintiff could, after that, have procured a load out of which he could have made as much money, or have earned freight, then, this is to be taken into consideration in assessing damages in the cause." "Should you come to the conclusion, from the evidence in this cause, that the plaintiff is entitled to recover, and that there are no circumstances proved by the defendant to abate or mitigate the damages, then, in assessing the damages, the law requires that you should award to the plaintiff, as damages, all the plaintiff could have made and cleared, had he been furnished with the corn and taken it to *New Orleans*, or the point of destination, from which the present value of the boat should be deducted."

The damages found by the jury were 450 dollars over and above the value of the boat, for which sum the plaintiff had judgment.

We think the Court erred in laying down the rule of damages. That rule places the plaintiff in just as good a condition, without the risk and labor of making a trip down the river, as he could possibly be in on his return

Nov. Term,
1851.

JONES
v.
VAN PATTEN.

from an entirely successful trip. This is certainly not equitable. There being nothing in this case to justify vindictive damages, the plaintiff should have had such damages as would have placed him in as good a condition at the time the contract was broken, as he would have been in had he not made the contract. And, when the contract was broken, instead of lying idle for the time his voyage would have consumed, he should have employed himself to as good an advantage as he reasonably could for his own gain, and made the earliest and best disposition of his boat to prevent loss. If he could not have got freight, he might, perhaps, have done something else to as good advantage; and, if his boat could not have been used by him, he should have preserved it with reasonable care or sold it, as would have been most judicious. Take an illustration: A man contracts to construct a public work which would employ him ten years and profit him a million of dollars. Just as he is ready to commence operations, he is notified that the contract must be abandoned. He sues for damages for the breach of the agreement. Now, though he was unable to obtain another contract upon a public work, still, shall he recover in the pending suit, the million of money that he could have made had he gone on and lived to complete, and been lucky in the completion of, the job he had contracted for, and have his time, for ten years, to be operating elsewhere, into the bargain? That is, be as well off then, as he possibly could have been under his contract ten years subsequently? We think not. He ought to recover what would make him reasonably whole at the time of the breach, all the circumstances of the case being considered. *Shannon v. Comstock*, 21 Wend. 457, and *Skinner v. Dayton*, 19 John. 513, are in point. See, also, *Clark v. Marsiglia*, 1 Denio, 317.

But, notwithstanding this erroneous instruction, we cannot reverse the judgment below. The instruction was not excepted to. A new trial was moved for and refused. An exception was taken to the refusal, and the evidence and instructions were embodied in the bill. This consti-

tutes all the objection that appears to have been made. It is a well established general rule that erroneous steps in the progress of a cause are waived, unless excepted to before additional steps are taken. If incompetent testimony is permitted to go to the jury without objection, no matter how great may have been its effect in producing the result in the cause, this Court could not, at least, in a civil action, reverse the judgment for that reason. The principle is this: If a party object in time, the error may be corrected without expense or trouble; and it is not right that he should lie by, take his chance of success over the error, and failing of it, then, at much expense of time and money on the part of others, overturn all subsequent proceedings, for the correction of said error. The rule, therefore, as to excepting to inadmissible evidence, is, that it must be done before the jury leave the box for deliberation, as till then, no injury has been occasioned, and the Court can instruct the jury to disregard the evidence. As to the instructions of the Court, they must be excepted to before the jury deliver their verdict, as, till then, if exception be made, the Court can correct, or the adverse party can waive, an instruction, and the jury may be correctly advised as to the law, and returned to review their deliberations. To this point the authorities are numerous. 7 Wend. 31.—3 Barr 44.—12 S. and M. 679.—6 Howard's U. S. 260.—8 Mis. 656.—3 Pike, 451.—26 Me. 444.—2 Gilman, 285.

Nov. Term,
1851.

JONES
v.
VAN PATTEN.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages, and costs.

D. Mace and R. Jones, for the plaintiff.

G. S. Orth and E. H. Brackett, for the defendant.

Nov. Term,
1851.

WALKER
v.
PRATHER.

JONES, Administrator of SHULTZ, v. VAN PATTEN.

ERROR to the *Tipppecanoe* Court of Common Pleas.

Per Curiam.—This case is affirmed, with costs; and the reasons are given in the next preceding case.

J. Pettit and *S. A. Huff*, for the plaintiff.

G. S. Orth and *E. H. Brackett*, for the defendant.

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WALKER v. PRATHER and Others.

A justice of the peace, not being the successor of another justice, but having the docket of the latter in his possession during a vacancy or absence, cannot grant an appeal from a judgment on such docket, and certify a transcript in the case, until he has previously transferred the judgment to his own docket.

A justice's certificate to a transcript given upon an appeal, showed that he was not the justice who rendered the judgment, but that the same was in his custody till a successor to the justice who did render the judgment, should be elected, and it did not show that the judgment had been transferred to his own docket. *Held*, that the dismissal of the appeal upon motion, in the Circuit Court, was right.

If this defect in the certificate had not been sufficient to justify the Court in dismissing the appeal, the refusal of the Circuit Court to admit evidence that the judgment had not been so transferred, would have been error.

Suit against an administrator and his sureties, before a justice of the peace. The demand stated that the plaintiff was the widow of the intestate, and entitled, under the statute, to certain personal property of the estate, which property she had demanded of the administrator. That statement was filed, with a copy of the administration-bond, as the cause of action. *Held*, that, under the R. S. 1843, the cause of action was sufficient.

Friday,
November 28.

ERROR to the *Jennings* Circuit Court.

BLACKFORD, J.—*Catharine Walker* commenced an action of debt, before *Beverly Kelsey*, Esquire, a justice of the peace, against *Hiram Prather* and others. The defendants pleaded several pleas in bar; and the justice ren-

dered judgment for the plaintiff. The case came before the Circuit Court on an appeal by the defendants from that judgment. The appeal was granted and the transcript certified, not by justice *Kelsey*, who rendered the judgment, but by another justice, namely, justice *Basnett*.

Nov. Term,
1851.

WALKER
v.
PRATHER.

The certificate attached to the transcript is as follows:
State of *Indiana*, *Jennings* county, ss. I, *Philander L. Basnett*, a justice of the peace within and for the township of *Vernon*, in said county, do hereby certify that the within is a true, full, and complete transcript from the docket of *Beverly Kelsey*, Esquire, late a justice of the peace in said township, who, having resigned his office as justice of the peace in said township, said docket has been deposited by said *Beverly Kelsey*, Esquire, with me, the justice of the peace in said township nearest to said *Kelsey*, to be by me kept until a successor shall be elected and qualified. The defendants have filed an appeal-bond before me, on the 27th of *November*, 1847, on an appeal prayed; which bond was by me approved, and an appeal granted.

Given under my hand and seal, the 5th of *April*, 1848.
Philander L. Basnett, J. P., [seal.]

The plaintiff moved to dismiss the appeal, on the ground that the said judgment had not been transferred to the docket of the justice who certified the transcript.

To support this motion, the plaintiff offered to prove, by the docket of justice *Basnett*, that the judgment had not been so transferred. This evidence was rejected.

The Court then, on the defendants' motion, dismissed the suit for the want of a sufficient cause of action.

The statutory provisions as to when one justice may give transcripts of judgments rendered by another, are as follows:

The justice with whom the docket of another may be deposited during a vacancy or absence, is hereby authorized, while having such docket legally in his possession, to transfer to his own docket any judgment on the docket left with him, that may be due while in the possession of

Nov. Term,
1851.

WALKER
v.
PRATHER.

such justice, at the request of the judgment-creditor, or any other party interested, and to issue execution thereon, or to give a transcript thereof, in the same manner as if the judgment and proceedings had been originally had before him; and he shall note such transfer, and the date thereof, in the docket from which such transfer is made.

The successor of any other justice, on obtaining his docket and papers, shall be authorized to issue executions on his judgments, and give and certify transcripts of his proceedings, and proceed in all cases in like manner as if the same had been originally had or instituted before him. R. S., p. 917.

According to these provisions, a justice of the peace, not being the successor of another justice, but having in his possession the docket of another justice in the cases provided for, cannot grant an appeal from a judgment on such docket, and certify a transcript in the case, until he shall have previously transferred the judgment to his own docket.

The certificate before us shows that justice *Basnett*, who gave it, was not the successor of the justice who rendered the judgment. That being the case, the appeal could not be taken and the transcript certified, until the judgment had been transferred to justice *Basnett's* docket. The certificate does not show, as we think it should, that such transfer had been made; and for that defect, it appears to us, the appeal should have been dismissed. If, however, we are mistaken as to that, the proceedings are still erroneous on account of the rejecting of the evidence which was offered by the plaintiff to prove that the judgment had not been transferred.

The Circuit Court decided the statement of demand to be insufficient. The suit is against an administrator and his sureties. The demand states that the plaintiff is the widow of the intestate, and entitled, under the statute, to certain personal property of the estate, which property she had demanded of the administrator. That statement was filed, with a copy of the administration-bond, as the cause of action. We think this cause of action, which

was filed in a justice's Court, is sufficient. R. S. 870, Nov. Term, 1851.
p. 1049.

Per Curiam.—The judgment dismissing the suit is reversed, with costs. Cause remanded, &c.

H. C. Newcomb, for the plaintiff.

W. B. Hagins, for the defendants.

ABSHIRE
v.
CLINE.

ABSHIRE v. CLINE.

In a count in slander, the words alleged to have been spoken by the defendant, were as follows: "*Sarah Jane*" (meaning the plaintiff,) "told me" (meaning the defendant) "that her brothers" (meaning certain brothers therein before mentioned) "had" (using obscene words importing carnal intercourse) "with her; thereby then and there meaning and charging that the said plaintiff had then and there confessed to him, the said defendant, that she had been and was guilty of sexual and incestuous intercourse with her brothers," &c. *Held*, that the words, with the accompanying averments, imputed fornication, and, as they were alleged to have been spoken of a female, were actionable, under the statute.

To a count in slander charging the defendant with the speaking of words imputing to the plaintiff the crime of incest with her brothers, the defendant pleaded "that the plaintiff did, on," &c., "at," &c., "tell the defendant that her said brothers had had sexual and illicit intercourse with her," &c. *Held*, that a demurrer to the plea was properly sustained.

To the count last named, the defendant pleaded, in justification of the words spoken, that the plaintiff had been guilty of incestuous intercourse with her said brothers, before the speaking and publishing of the words, &c., and the Court, upon the trial, refused to admit evidence that the plaintiff had been guilty of such sexual intercourse. *Held*, that the evidence was improperly excluded.

In an action of slander, the defendant cannot prove, under the general issue, the truth of the words laid in the declaration in order to rebut the inference of malice.

ERROR to the *Elkhart* Circuit Court.

SMITH, J.—This was an action for slander, by *Cline* against the plaintiff in error.

The declaration contained two counts. The first count charged that the defendant had spoken words of and con-

Saturday,
November 29.

Nov. Term,
1851.

ASHBURN
v.
CLINE.

cerning the plaintiff, importing that the defendant had committed fornication with the plaintiff.

The words alleged to have been spoken, by the second count, were as follows: "*Sarah Jane*" (meaning the plaintiff) "told me" (the defendant) "that her brothers" (meaning certain brothers of the plaintiff before mentioned) "had" (using obscene words importing carnal intercourse) "with her; thereby then and there meaning and charging that the said plaintiff had then and there confessed to him, the said defendant, that she had been and was guilty of sexual and incestuous intercourse with her said brothers," &c.

The defendant pleaded the general issue; and, also, two pleas to the second count.

The first plea to the second count averred, in justification of the words spoken, that the plaintiff was guilty of incestuous intercourse with her said brothers, before the speaking and publishing of the words, &c.

The second plea to this count averred that the plaintiff did, on, &c., at, &c., tell the defendant that her said brothers had had sexual and illicit intercourse with her.

This plea was demurred to and the demurrer was sustained.

A trial was then had on the remaining issues, and the plaintiff obtained a verdict and judgment.

A bill of exceptions shows that the defendant offered to prove by a witness introduced by him, the truth of the words charged by the first count, for the purpose of rebutting the inference of malice, which the Court refused to permit him to do. The defendant, also, to sustain the plea to the second count, offered to prove by two witnesses, that the plaintiff was guilty of incestuous intercourse with her said brothers, for the purpose of corroborating the testimony of one *Wright*, who had testified that the plaintiff communicated to him that she had had sexual intercourse with her brothers; which evidence was objected to, and was excluded by the Court.

One of the errors assigned is, that the Court errone-

ously sustained the demurrer above mentioned. The plaintiff in error contends that the second count is itself bad, for the reason that the words alleged to have been spoken are not actionable. We think, however, the words charged in the second count, with the accompanying averments, impute the crime of fornication, and, therefore, as they are alleged to have been spoken of a female, they are actionable. R. S. c. 40, s. 128, p. 691. This case differs from that of *Lumpkins v. Justice et ux.* Ind. R. 322 (1), as that was a suit brought by a male plaintiff, who would not have been indictable for a mere act of fornication or adultery, and as against whom words spoken imputing such an act, are not made actionable by the statute. The words alleged by this count to have been spoken, do not, perhaps, amount to a directly affirmative charge that the plaintiff had been guilty of fornication, but it is not necessary that they should. If the words were calculated to induce the hearers to suppose or understand that the plaintiff was guilty of the crime imputed, an action may be sustained. *Drummond v. Leslie*, 5 Blackf. 453. There can be no doubt that the words in question are of that character.

The second plea to the second count is useless. It can only be considered good by regarding it as similar, in substance, to the first plea. Under that plea, admissions of the plaintiff that she had been guilty of the crime imputed by the words alleged to be slanderous in the count to which it was pleaded, were admissible evidence. But the words set out in that count are actionable, because spoken in a malicious sense, and it would be no justification to prove that the plaintiff had said something in jest, which, if spoken seriously, might have amounted to an admission of the crime imputed; while, on the other hand, if the defendant wished to prove that he spoke the words on a justifiable occasion, without malice, he could have done so under the general issue. *Abrams v. Smith*, 8 Blackf. 95. We think, therefore, the demurrer to this plea was correctly sustained.

Nov. Term,
1851.

ABSHIRE
v.
CLARK.

Nov. Term,
1851.

WILLIAMS
v.
BEISEL.

The next error assigned is, that the Court erred in excluding the evidence offered by the defendant.

There was no error committed in refusing to permit the defendant to prove the truth of the words charged by the first count, for the purpose of rebutting the inference of malice. It is well settled that such evidence is not admissible for that purpose, under the general issue. *Burke v. Miller*, 6 Blackf. 155.

But proof that the plaintiff had been guilty of sexual intercourse with her brothers, was admissible under the plea of justification to the second count. Such evidence was certainly pertinent to the issue made by that plea, and the Circuit Court erred in excluding it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

L. Barbour, for the plaintiff.

(1) 1 Carter's Ind. R. 557.

WILLIAMS v. BEISEL.

A. B. recovered a judgment in the *Lagrange* Circuit Court against *C. D.*, and in the vacation of the Court immediately following, one *E. F.* acknowledged himself replevin-bail for the stay of execution thereon, as follows: "*A. B. v. C. D.*—Comes now *E. F.* and acknowledges himself replevin-bail and security for the payment of the above judgment, at the expiration of the time allowed by law for the stay of execution. (Signed) *E. F.*" This entry was entitled in the same manner as the judgment, but several entries intervened on the order-book between it and the entry of judgment. *E. F.*, over five years after he had executed the recognizance, moved to set it aside as void. *Held*, that the recognizance was, substantially, in the form required by the statute. *Held*, also, that after the lapse of time mentioned, the circumstance that the recognizance was not written immediately under the entry of judgment, furnished no sufficient ground for setting it aside.

Saturday,
November 29.

APPEAL from the *Lagrange* Circuit Court.

SMITH, J.—This is an appeal taken from the decision of the Court below, setting aside a recognizance of replevin-bail.

It appears, by the bill of exceptions, that, at the *April* term of the *Lagrange* Circuit Court, in 1844, *Williams* obtained a judgment against one *Edward Wright* for 371 dollars and 67 cents, and costs of suit. During the vacation immediately following said term, *Beisel* became replevin-bail for the stay of execution on said judgment, by acknowledging a recognizance in the following form:

Nov. Term,
1851.

WILLIAMS
v.
BEISEL.

"*Samuel P. Williams v. Edward Wright.*—Comes now *Peter Beisel* and acknowledges himself replevin-bail and security for the payment of the above judgment, at the expiration of the time allowed by law for the stay of execution. *Peter Beisel.*"

This entry is entitled in the same manner as the judgment, but it was not made immediately under the judgment, on the order-book, there being several intervening entries.

The statute requires every recognizance of bail for the stay of execution, taken by a clerk of a Circuit Court, to be written immediately following the entry of the judgment, and to be substantially in the following form:

"I acknowledge myself replevin-bail for the payment of the foregoing judgment, together with the interest and costs accrued and to accrue thereon, at or before the expiration of the time allowed by law for the stay of execution on such judgment."

We think the entry in this case is substantially in the form required by the statute. It is true, the words "together with the interest and costs accrued and to accrue thereon," are omitted, but as such interest and costs are included in the judgment, the effect of the entry is not varied by the omission.

Neither do we think the fact that the recognizance was not written immediately under the judgment, afforded a sufficient reason for setting it aside at the time when this motion was made, which was more than five years after the entry. We regard the provision of the statute as to the place where the recognizance shall be written, as only directory to the clerk. It could scarcely have been the intention of the legislature to enact, that, if this direction

Nov. Term, 1851. was not literally followed, the entry should be absolutely void.

LEWIS
v.
MATLOCK.

Perhaps if the motion had been made at a seasonable time, to have the entry set aside or altered, as not being strictly conformable to the statute in this particular, it might have been entertained, but we are of opinion that, in this case, the motion having been made by the bail long after the time for which the judgment was stayed had expired, it should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. Brackenridge, Jr., for the appellant.

J. B. Howe, for the appellee.

LEWIS v. MATLOCK and Others.

Evidence is admissible to prove the consideration of a general receipt upon a judgment.

A judgment-creditor filed his bill to subject to sale for the payment of his judgment, land previously conveyed by the debtor to another creditor, to secure a prior judgment of the latter. The Court found a balance due on the older judgment, and decreed that the premises should be sold and the proceeds applied—first, to the payment of such balance; and, next, towards the satisfaction of the complainant's judgment. *Held*, that the complainant could not object to the decree.

Saturday,
November 29.

ERROR to the *Hendricks* Circuit Court.

SMITH, J.—*Lewis*, the plaintiff in error, filed a bill in chancery to subject certain real estate to the payment of a judgment rendered in his favor in *October*, 1842, against one *Dicken*.

The facts disclosed by the bills and answers are as follows:

In the year 1836, *Dicken* conveyed the property in question to *Alexander Worth*, as the agent of one *Simpson*, to secure a debt amounting to about 1,900 dollars, due from *Dicken* to *Simpson*. In 1838, *Dicken* having paid *Simpson*

a part of that sum, *Worth* took from him three notes for the payment to *Simpson* of about 1,500 dollars, and gave him a bond for the conveyance of the property to him on the payment of those notes. *Simpson* obtained judgments on those notes in the *Hendricks* Circuit Court, and assigned the judgments to *Matlock*, directing *Worth* to hand over to *Matlock* the securities that had been taken.

Nov. Term
1851.

LEWIS
v.
MATLOCK.

Lewis charged in his bill that these judgments had all been satisfied, and that *Dicken* was entitled to a reconveyance by *Worth*.

One of these judgments was for 549 dollars, and upon it an execution was issued in 1841, under which the sheriff levied on a tract of land and a large quantity of personal property. A part of this property was sold for money sufficient to satisfy this execution in full, and to make about 73 dollars surplus, which was applied on an execution issued on one of the other judgments. The remainder of the property levied on, being personal property, remained unsold for want of bidders, and was left in *Dicken's* hands, who used and disposed of it without any objection from *Matlock*, who was not present, assumed no control, and had no express knowledge of the proceedings of the sheriff.

Upon the other two judgments in favor of *Simpson*, there were various credits indorsed, showing payments at different times, and receipts by *Matlock*, dated *March* 6th, 1841, for the balance due in full.

Matlock charged, in a cross bill, that on said 6th of *March*, 1841, he had an account with *Dicken* of the balance due on these judgments, and it was found there then remained unpaid 531 dollars; and that he agreed to take a conveyance of a part of the land at the price of 500 dollars, 31 dollars only being paid him in money; in this way, explaining the reason of the judgments being receipted in full.

It was charged and admitted, that in *July*, 1841, *Dicken* sold to one *De Pew* all of the property except that part conveyed to *Matlock*, as above mentioned, for 720 dollars, and *Worth*, with the consent of *Matlock*, made a convey-

Nov. Term,
1851.

LEWIS
v.
MATLOCK.

ance to *De Pew*. In this transaction, to procure the consent of *Matlock*, *De Pew* was to surrender a note for 107 dollars which *Matlock* owed him, in part payment. For the balance of the purchase-money, he was to account to *Dicken*; but *Matlock* denies that *De Pew* ever gave him the said note.

Although the receipts for the balances due on these judgments bear the date of *March 6th, 1841*, they were, in fact, made in 1848, and were ante-dated. It was proved, by oral testimony, that in 1848 *Dicken* still owed *Matlock* upwards of 700 dollars on the judgments; that the latter took a conveyance of the property before mentioned at the price of 500 dollars; that it was actually worth about 400 dollars; and that the balance, to make up the 700 dollars due, was paid him by the replevin-bail, *Dicken* being then notoriously insolvent.

The Circuit Court decreed that there was due on these judgments, to *Matlock*, 500 dollars; that *Matlock* holds the premises in trust for the payment of that sum; and that the complainant may have an execution to sell the property so held by *Matlock*, to be applied to the payment of his debt, *after the payment of that sum to Matlock*.

The plaintiff in error contends that parol evidence was inadmissible to contradict the records of the judgments and executions showing their satisfaction. But the evidence admitted does not in any way impeach or contradict the receipts; it merely shows the nature of the consideration for which they were executed, and for this purpose it is certainly unobjectionable.

We think the decree is clearly right, or, at least, as favorable to the complainant as he could ask. *Matlock* received the land which the complainant now seeks to have applied to the payment of his debt, in part satisfaction of his prior judgments, and as there is nothing in the case which affords any ground for giving the complainant the priority, the most he could demand would be to have the land sold, if it was worth more than it was received for by *Matlock*, and to have the surplus appropriated to the payment of his debt.

Per Curiam.—The decree is affirmed with costs.

J. A. Wright and *C. C. Nave*, for the plaintiff.

J. S. Harvey, for the defendants.

Nov. Term,
1851.

WATSON
v.
THE STATE.

WATSON v. THE STATE.

To support an indictment against a defendant for knowingly suffering his horse to be run in what is commonly called a horse-race, along a public highway, it is not necessary to prove that a bet or wager was made, or a distance to be run agreed upon, or that judges were appointed to decide upon the result of the race.

Upon the trial of such an indictment, evidence that the race was run along a road leading from one specified town to another in the county, &c., is sufficient, *prima facie*, to sustain the averment that the road in question was a public highway.

ERROR to the *Switzerland* Circuit Court.

Saturday,
November 29.

SMITH, J.—This was an indictment against the plaintiff in error for knowingly, and wilfully, permitting his horse to be run in what is commonly called a horse-race, along and upon a public highway, leading from *Jacksonville* to *Allensville*, in the county of *Switzerland*. Plea, not guilty.

Upon the trial the defendant was found guilty and fined.

A witness for the state testified that, on the day of the presidential election, in 1848, he saw the defendant hand the reins of the bridle of his horse to one *Moulton*, and *Moulton* immediately took the horse some distance down the road leading from *Jacksonville* to *Allensville*, and he and another person came back running the horses as fast as they could run, or about as fast; that *Moulton* rode the horse of the defendant; that the road they ran upon was in *Switzerland* county; that there were many persons present; and that the distance they ran was about a quarter of a mile. This witness also said that he knew of no judges appointed to decide the race; that there was no bet

Nov. Term,
1851.

WATSON
V.
THE STATE.

made; that when the defendant gave over the horse to *Moulton*, the defendant was near the place where the race ended, and remained there; and that the riders were not dressed in any unusual manner.

Another witness for the state testified to the same facts, and that he had seen the defendant have the horse in his possession both before and after the time of the running; that he considered the running to be a horse-race, and supposed the horses were run to try their speed.

Moulton, being called for the defendant, testified that he borrowed the horse from the defendant to gallop with another person's horse; that there was no race run; that they did not gallop at more than half speed; that neither of the animals was whipped; that there was no bet and no judges chosen; that the defendant did not know the witness intended to run the horse; and that the horses were galloped to see how they galloped together, and not for the purpose of running a horse-race.

Another witness for the defendant stated that he saw *Moulton* and one *Bright* gallop the horses up the road, on the day above mentioned; that they did not run very fast; and that nothing was bet.

The foregoing being all the evidence, the defendant applied for a new trial, which was refused.

The indictment was founded on section 103, c. 53, R. S., p. 982, which enacts that, "Any person who shall knowingly suffer his horse, mare, or gelding, to be run in what is commonly called a horse-race, along any public highway in this state," on being convicted thereof, shall be fined, &c.

The plaintiff in error contends that to constitute what is commonly called a horse-race, there must be a bet or wager; there must be a distance to be run agreed upon; and there must be judges appointed to decide the race.

We do not think any of these formalities are necessary to make the offense defined in the section of the statute above quoted. The betting upon a horse-race is a game or wager, and is punishable under another section. *Cheesum v. The State*, 8 Blackf. 332. The object of the section

upon which this indictment is predicated, appears to have been to prevent fast riding upon the public roads, to the inconvenience and danger of persons passing and re-passing.

It is also contended that it is not proved the defendant knew his horse was to be run. The jury may have thought the statement of *Moulton*, that the defendant did not know he intended to run the horse, unworthy of credit, and they had a right to give such weight to his testimony as they thought proper. We think it might be inferred, from the circumstances given in evidence, that the defendant did know a race was to be run, and that he gave *Moulton* possession of his horse for that purpose. The statement of the latter that the defendant did not know the purpose for which the horse was given to him, can, at most, be regarded as an opinion, or as amounting to a statement that he did not tell the defendant he was about to run a race.

The last point which the plaintiff in error has endeavored to make, is, that it was not sufficiently proved the race was run along a public highway within the state. We think the evidence that it was run along a road leading from one town to another in the county of *Switzerland*, was sufficient, *prima facie*, to sustain the averment in the indictment that the road in question was a public highway.

Per Curiam.—The judgment is affirmed with costs.

D. Kelso, for the plaintiff.

D. Wallace, for the state.

Nov. Term,
1851.

BURGER
v.
RICE.

BURGER v. RICE.

3	135
144	89

A contract, under the R. S. 1843, for the maintenance of the poor, imposes upon the party contracting to maintain them, a personal trust which he cannot assign.

Nov. Term, 1851. An agreement by him to assign the contract is void as against public policy.

BURGER
v.
RICE.

Saturday,
November 29.

ERROR to the *Floyd* Circuit Court.

PERKINS, J.—Assumpsit by *Burger* against *Rice*. The declaration alleges that the defendant had agreed, in consideration, &c., to give to the plaintiff the keeping of one-half of the paupers of *Floyd* county, at a certain price; that the plaintiff had been ready and willing to keep them, &c. There is, also, a count for the boarding of paupers, &c.

Pleas, the general issue, and accord and satisfaction. Replication to the second plea, no accord, &c. Issues of fact, and a jury trial. Verdict and judgment for the defendant.

On the trial, *William Thomas* testified that, about the 1st of *May*, 1847, the day on which *Rice* contracted with the overseers of the poor of *Floyd* county to keep the paupers for said year, he was in *New Albany*. On the way home, he heard *Rice* and *Burger* state over the contract between them. They had been keeping the paupers the year before. They were each to keep what they then had, and as each additional pauper was brought out, each was to take alternately. *Burger* was to have one-half, and *Rice* one-half. If there was a turbulent one, they were to keep him month about. *Burger* was to receive one dollar a week each for those he kept, and was to feed, clothe, and lodge them. *Rice* made the same contract with *Burger* for keeping the half, that he had with the overseers for keeping the whole. The contract between them was for one year.

John Watts was present and heard the contract between *Rice* and *Burger* made. It was as testified to by *Thomas*, and was made in the court-house yard in *New Albany*, on the day *Rice* contracted for the poor with the overseers. *Burger* was prepared and willing, during the whole year, to keep the half of the paupers, and *Rice* was so informed. *Burger* did keep them awhile, and received his pay for so doing, according to the contract. He at one time complained to *Rice* that his portion of the paupers

were taken from him. *Rice* replied that they had not been well treated about eatables; that the overseers of the poor for *Lafayette* township had been down and ordered them taken away.

Nov. Term,
1851.

BURGER
v.
RICE.

The Court gave to the jury the following instructions:

"The contract between the defendant and the overseers, for the maintenance of the poor, if made pursuant to law, is a valid contract. It imposed upon *Rice* a personal trust which he could not rightfully transfer to another. Such a transfer is not in accordance with the terms of the contract, is not authorized by law, and is in violation of most obvious principles of public policy. A contract by which the defendant was to place one-half of the paupers, for the term of one year, under the exclusive control of the plaintiff, who agrees to provide for them in the mode, and for the consideration, stipulated in the contract between the overseers and *Rice*, is illegal. If the evidence satisfies you that such was the contract between the parties to this suit, you should find for the defendant. The law will neither enforce such a contract, nor relieve a party from loss by having in part performed it."

The following is the provision of law under which the paupers were disposed of to *Rice*:

"It shall be the duty of the overseers of the poor in such counties as have in them no common poor-house established by law, two weeks next preceding the first *Monday* of *May* in each year, to give public notice, by having published in the newspaper or newspapers of their respective counties, or by posting upon the court-house door, and in other public places in such counties, an advertisement certifying the poor that are to be provided for, and asking sealed proposals for their maintenance during said year, which sealed proposals shall be opened and acted on by said overseers on said day; but nothing herein contained shall prohibit any overseers of the poor from receiving and accepting propositions, at any time, for the keeping of such poor persons as may, in the interim, become a county charge." R. S. p. 356, s. 6.

The decision of this case may depend somewhat, per-

Nov. Term,
1851.

BUNGER
v.
RICE.

haps, on the construction to be given to this section of the statute. If, by it, we are to understand that the overseers of the poor are bound to turn them over to the keeping, for the year, of that person of responsibility whose bid may be the lowest, regardless of the moral character of the bidder; if, for example, the keeper of a brothel or any other house that might be a public nuisance, would be entitled to take them upon the lowest bid and sufficient security, then, it would seem that we could not say that there was anything of personal trust connected with the keeping of the public poor; nothing of the principle, *detur digniori*. But, if the overseers, in awarding the paupers upon bids received, are to be influenced by the moral character of the bidder, as well as by the price offered and the responsibility connected with it, then the keeping of the poor may well be regarded as a personal trust, which, of course, cannot be transferred by assignment, and can only be shifted upon another with the consent of the overseers. If the paupers are awarded to the contractor's personal care, on account of his fitness to bestow such as is proper, he must exercise that care himself.

This latter construction is not repugnant to the letter of the law, for it does not declare that the paupers shall be given to the lowest bidder; and it is, we think, the construction which the moral sense and the dictates of humanity require to be given. This construction is also somewhat favored by other provisions of the law. Section 5, p. 356, R. S., makes it the duty of the overseers to exercise a general oversight as to the treatment of the paupers; and by section 34, R. S., p. 361, the county commissioners, in those counties where asylums are built, are to employ some *humane* person to take charge of the same.

As to the right of assignment, there are analogous cases in law. Among them, that of an apprentice may be mentioned. A contract of apprenticeship is not assignable, except by consent of the parties concerned. 2 Kent's Comm. 264, and note *f*. See, also, *Blach-*

ford v. Preston, 8 T. R. 89.—*Richardson v. Mellish*, 2 Nov. Term, Bing. 229. 1851.

In this view of the case, the contract between the plaintiff and defendant was against public policy and void.

TEVIS
v.
DOE.

Per Curiam.—The judgment is affirmed with costs.

R. Crawford, for the plaintiff.

J. Collins, for the defendant.

TEVIS and Another v. DOE.

If the party who has paid the consideration for land and is entitled to a deed, has the land conveyed for his use to another, the latter holds the land simply in trust for the former, and it is liable to execution, under the R. S. 1843, upon any judgment against the person for whose use it is held.

Where a judgment-debtor colludes with a third person and procures land to be conveyed to the latter to defraud judgment-creditors, the land is liable, under the R. S. 1843, to execution upon the judgment.

A. became replevin-bail in 1840 upon a judgment against *B.* *A.*'s property was afterwards sold upon execution to satisfy the debt. In 1847, *A.* obtained a judgment against *B.* for the amount made by the sale of his property, and *B.*'s land was sold without appraisement to satisfy the same. *Held*, that as there was no law when *A.* became bail requiring the appraisement of land sold upon execution, the sale of *B.*'s land without appraisement was right.

ERROR to the *Rush* Circuit Court.

Saturday,
November 29.

PERKINS, J.—Ejectment by *Doe* on the demise of *Fletcher Tevis*, jun., for nineteen and a half acres of ground, being a part of the north-east quarter of section 19, &c., in *Rush* county. *Andrew Colliver* and *Joel Tevis* were admitted defendants. They entered into the usual consent-rule, and put in the plea of not guilty. The cause was tried by the Court, without a jury, and there were a finding and a judgment for the plaintiff.

It was shown in evidence that the legal paper title to the land in question, was in *Andrew Colliver*; that it was conveyed to him on the 3d day of *May*, 1847, by *George*

Nov. Term,
1851.

TEVIS
v.
DOE.

Hewitt, and wife, in whom it then was ; but, on the part of the plaintiff below, it was shown that said *Hewitt* had sold the land by contract, in 1844 or 1845, to *Joel Tevis*, received the greater part, if not all, of the purchase-money, and put him in possession ; that in the spring of 1840, a judgment was rendered in favor of one *Sevell* against said *Joel* and one *Fletcher Tevis*, which judgment was stayed by *John D. Tevis* as bail ; that said *John D. Tevis*'s property was sold on execution to satisfy said judgment, and that on the 29th of *April*, 1847, four days before the land in question was deeded to *Colliver*, said *Tevis* obtained a judgment, on motion, awarding execution in his favor against said *Joel* and *Fletcher Tevis* for 227 dollars, the amount made out of his property as their replevin-bail ; that, at that time, *Joel Tevis* had a bill in chancery pending against said *Hewitt* in the *Rush* Circuit Court, to compel the execution of a deed for said land from said *Hewitt* to said *Joel Tevis* ; and that after said judgment in favor of *John D. Tevis* against said *Joel* and *Fletcher* was rendered, an arrangement took place between said *Joel*, *Hewitt*, and *Colliver*, pursuant to which said *Hewitt* deeded said land to *Colliver*, and not to said *Joel*. *John D. Tevis*, believing that that conveyance was fraudulent, had his execution, on his above-mentioned judgment, levied on said land, by virtue of which levy the land was sold as the property of *Joel Tevis*, by the sheriff of *Rush* county, on the 18th day of *September*, 1847, and deeded to *Fletcher Tevis*, jun., the lessor of the plaintiff below.

Upon the trial in the Circuit Court, the conveyance to *Colliver* was decided to be fraudulent, and the land was held to have passed by the sheriff's sale to said *Fletcher Tevis*, jun.

The first question made in this Court, is whether the proof shows the conveyance of the land to *Colliver* to have been fraudulent. We shall not incorporate the evidence upon this point in our opinion. The question was for the jury, or the Court discharging the function of the jury ; and such is the evidence, that, had the finding been

either way, we could not, by the rules of law, have disturbed it. It could, therefore, form no precedent, even were the evidence set out, in future circuit trials, in aid of correct verdicts.

Nov. Term,
1851.

TEVIS
v.
DOX.

Next, the position is taken that, admitting the conveyance to have been fraudulent, this is not a case within the provisions of the statute of frauds in reference to the sale of lands on execution.

Our statute (R. S. p. 453, s. 1,) enacts, among other things, that "lands, tenements, and hereditaments, fraudulently conveyed with intent to defeat, delay, or defraud creditors," and such as are "holden by any one in trust for or to the use of another," shall be liable to be sold on execution, &c. Now, if *Joel Tevis* had fully paid the consideration for this land to *Hewitt*, and was entitled to a deed, but had the same conveyed for his use to *Colliver*, *Colliver* held the land simply in trust for said *Joel*, and it was subject to the execution in this case. See *Begart v. Perry*, 1 John. Ch. R. 52. And if said land was conveyed to *Colliver*, by the procurement of said *Joel*, "with intent to defraud" said *John D. Tevis* out of his judgment; and said *Colliver* was a party to the fraud, then, without regard to the question of the payment of the consideration, the land was subject to the execution. These questions were for the jury, as to the facts.

It is next objected that the land was sold without appraisement. *John D. Tevis* became bail on the judgment in question, in 1840. That, therefore, is the date of the contract out of which the liability of *Joel* and *Fletcher Tevis* to him arose; and we think it right that he should have the advantage of the law of that date. That law required no appraisement.

On the trial, *Colliver*, with a view to show that he had paid something to *Joel Tevis* for the land conveyed, proved that he had, as replevin-bail, been compelled to pay a judgment for said *Tevis*. The plaintiff, in rebutting, proved, by *A. W. Hubbard*, that soon after *Colliver* paid said judgment, he employed said *Hubbard* to sue a constable for some neglect in regard to its collection, and that

Nov. Term,
1851.

PHILIPS
v.
DOE.

the constable and his sureties compromised with *Colliver* and paid him within 15 or 16 dollars of the amount he had paid on said judgment.

This evidence was objected to on two grounds: 1. Because the proceedings in said suit against the constable were not given in evidence; and, 2. That if the constable and sureties did pay back the money to *Colliver*, it was his gain, and *Tevie* had no right to the benefit of it.

As to the first objection, it is a sufficient answer to say that it does not appear that any suit was instituted against the constable; and, further, if there was, the money was not collected by means of a judgment in the suit, but was paid on a compromise, perhaps a verbal one, independent of the suit, and there could be no objection to proving such a compromise by parol and the amount paid upon it.

As to whether *Tevie* had a right to the benefit of that payment, or not, there is nothing on the record showing us what the neglect of the constable, on account of which he paid the money, was. If it was such as gave *Tevie* a right of action against him, and *Colliver* having paid the judgment, availed himself, by the consent of *Tevie*, or otherwise, of that right, *Tevie* should have the benefit of the amount collected. It may have been such a case.

Per Curiam.—The judgment is affirmed with costs.

R. S. Cox, J. Perry, and E. Coburn, for the plaintiffs.

J. S. Newman, for the defendant.

PHILIPS v. DOE on the Demise of TUCKER.

A lease of land contained an agreement that the lessee should pay a specified rent, at periods stated, and should he, at any time during the term, neglect or refuse to pay the rent when due, he thereby authorized the lessor to re-enter upon and take possession of the premises, without hindrance. *Held*, that to work a forfeiture of the lease for the non-payment of rent, a demand of the rent should have been made on the premises, just before sun-set of the day when it became due.

On this point, the R. S. 1843 have not changed the common law.

The lease contained a covenant that no wheat, &c., or other article, used or growing on the premises, should be taken off until the full amount of the rent coming to the lessor had been paid. *Held*, that a breach of this covenant did not work a forfeiture of the lease.

It is not error for the Court to refuse to give an irrelevant instruction to the jury.

Nov. Term,
1851.

PHILIPS
v.
DOE.

ERROR to the *Cass* Circuit Court.

Saturday,
November 29.

PERKINS, J.—Ejectment by *Doe* on the demise of *Tucker* against *Philips*. Recovery by the plaintiff below.

The facts are that, on the 19th day of *August*, 1847, *William Brown*, then the owner of the land hereinafter described, being that involved in this suit, leased it to *James Tucker*, by an instrument, among other things, witnessing: "That the said *Tucker*, on his part, for the considerations hereinafter mentioned, agrees and obligates himself to the said *Brown*, his heirs, &c., to clear, in a good farmer-like manner, fit for plowing, a certain piece of ground on the farm lately owned by *W. F. Rowan*, estimated to be about 20 acres, now inclosed with a fence. Also, another piece of ground, to be cleared in like manner, on said farm, estimated to contain three or four acres, not inclosed. This last named piece to be inclosed by moving one end of the fence to the side," &c. Then follow certain specifications as to the manner in which said *Tucker* was to manage and improve the farm, and a statement that he was to pay rent. The instrument proceeds: "The first payment to be made by said *Tucker* shall be on or before the 1st day of *January*, 1849, at the rate of two dollars for each acre cleared on said premises, and so on annually during the time said *Tucker* may have possession thereof. The time hereby leased or rented is five years from and after the first day of *January* next, (1848,) unless sooner discharged from said premises. For the above-mentioned clearing, making rails and repairing fences, cutting down and burning up trees and fallen timber, making ditches, &c., the said *Brown* hereby agrees to pay to said *Tucker* 130 dollars, which is in full for all the above-mentioned work; payment to be made as soon as said clearing and fencing are

Nov. Term,
1851.

PHILIPS
v.
DOW.

done. No wheat, corn, hay, or other article, used or growing on said premises, shall be taken off the same until the full amount of rent coming to said *Brown* is paid. The number of acres to be cleared, as above mentioned, to be mutually ascertained by the parties, when the same is finished. The clearing above mentioned to be added to the cleared land, and two dollars paid to said *Brown* for each acre annually, by the 1st day of *January*, 1849. The total number of acres, by estimate, including that to be cleared, is between 55 and 60 acres. It is also further agreed by the said *Tucker*, that, if said *Tucker* shall, at any time during the five years above mentioned, neglect or refuse to pay the rent when due, viz: two dollars for each and every acre cleared on said premises, the said *Brown* is hereby permitted, and the said *Tucker* hereby authorizes the said *Brown*, to re-enter on said premises, and take possession of the whole of them, without any hindrance whatever," &c. (Signed,) "*James Tucker*, [seal]. *W. Brown*, [seal]."

Tucker entered into possession, but did not move his family on to the place. He failed to pay the rent due on the 1st of *January*, 1849, but it was not, on that day, demanded of him, nor was it ever demanded on the premises. In the spring of 1849, *Tucker* sub-leased the house and garden on said farm to *Jacob Richardson* till the 1st of *October* following. On the 26th of *April*, 1849, being after *Tucker's* lease to *Richardson*, *Brown* sold the land to *Philips*, giving him a bond for the conveyance to him of the title, on his payment of the purchase-money at a future day. Soon after this purchase by *Philips*, he bought *Richardson's* lease on the house and garden from *Tucker*, and took possession of them and the farm. Thereupon *Tucker* brought his ejectment; and on the trial the Court instructed the jury:

1. "That in order to work a forfeiture of the lease for the non-payment of rent, it was necessary that *Brown* should demand the amount of the rent due, on the premises, on the day it fell due."

This was right. Ad. Eject. 160. On this point, our

statute has not altered the common law. The demand should have been made just before sun-set. *Jackson v. Harrison*, 17 John. 66 (1).

Nov. Term,
1851.

PHILIPS
v.
DOX.

2. "That the removal by *Tucker* of the hay, grain, &c., from the premises, before the payment of the rent, did not work a forfeiture of the lease."

If the provision in the lease prohibiting the removal of the hay, &c., was simply a covenant, as it is not declared in the lease that the breach of said covenant shall work a forfeiture, or give a right of re-entry, no such consequence would follow its breach, and the instruction was right.

If, however, that provision constituted a condition, a breach of which determined the lease, the instruction was wrong. In *Coke upon Littleton* 204, *a*, in the observation upon section 330, it is said: "Hereby it is evident, that some words of themselves do make a condition, and some other (whereof our author here, and in the next section, putteth an example,) do not of themselves make a condition without a conclusion and cause of re-entrie." If, in the present case, the language in the instrument had been, "*Provided*, and the lease is upon this condition, that if the hay, &c., shall be removed before, &c., said lease shall determine," &c., it would have been clearly enough a condition. But, as it is, we think the provision a covenant, and not a condition; that the lease was not forfeited by its breach; and that the instruction was correct. See *Jackson v. Harrison*, *supra*.—4 Kent's Comm. 123.—*Jackson v. Allen*, 3 Cowen, 220.—*Clark v. Jones*, 1 Denio, 516.

The Court refused instructions asserting doctrines contrary to those contained in the instructions given. We need not notice them. The Court also refused to give this instruction:

"When the lessor has recovered possession of the premises, a Court of Equity will not grant relief, if such recovery was on account of the non-payment of rent. Ad. on Eject. 171."

We do not see its relevancy.

Nov. Term,
1851.

PHILLIPS
v.
DOZ.

The plaintiff below recovered the farm, but not the house and garden; and it is contended that the evidence is the same in relation to the former as to the latter, and that if he had not a right to the possession of the house and garden, neither had he to that of the farm. But the witnesses say he had leased the house and garden to *Richardson*, and thus deprived himself of the right of possession of them, for a term extending beyond the time when this suit was commenced. They do not say he had leased the farm.

Per Curiam.—The judgment is affirmed with costs.

W. Wright, for the plaintiff.

D. D. Pratt, for the defendant.

(1) Where the landlord is about to enter for a forfeiture for the non-payment of rent, the common law required a previous demand of the rent due, with circumstances of great particularity. On the very day upon which the rent becomes due, at a convenient time, before sun-set, the lessor must make an actual demand of the exact amount of the rent due, at the particular place at which the rent may be made payable by the terms of the lease; or, if there be no place stipulated in the lease, then at the most notorious place upon the land demised, which, if there be a dwelling-house, is the front door. But if the lessee, at any time of the day upon which the rent becomes due, meet the lessor on or off the lands demised, and tender the rent, the forfeiture will be saved; so that the lessor cannot put his right in force until after the expiration of that day. *Comyn on Landlord and Tenant*, 327.—*Gilbert on Rents*, 88.

But where a forfeiture of the estate, and an entry for the forfeiture, is stipulated for in the lease, in case of the non-payment of rent at the regular days of payment, the right of entry is deemed, in *Equity*, to be intended as a mere security for the rent, and the lessee will be relieved from the forfeiture upon the payment of the rent and any damage the lessor may have sustained by his neglect. Courts of law have also interfered in the tenant's behalf, under such circumstances. *Comyn on Landlord and Tenant*, 565.—*Greenl. Cruise on Real Property*, 2d vol., p. 31.—2 *Story's Eq. Ju.*, ss. 1314, 1315. Equity will, also, relieve against a penalty for a breach of a covenant contained in the lease, by granting an injunction upon proceedings instituted at law to recover it; and if the penalty is to secure the payment of money, it will relieve the lessee upon his paying the principal and interest; and where the penalty is to secure a collateral act or undertaking, will direct an issue of *quantum damnificatus*, and compel the lessor to take only so much as amounts to a compensation for the breach of the covenant. *Com. on Land. and Ten.* 571.—2 *Story's Eq. Ju.*, ss. 1314, 1315.

The law does not favor forfeitures of estates, and strict proof of a breach of a condition or covenant working a forfeiture of a lease, is always required. *Addison on Cont.* 657.

REINHARD v. KEITH.

Nov. Term,
1851.REINHARD
v.
KEITH.

In a proceeding in foreign attachment, property of the absconding debtor must have been attached in the county where the writ of attachment was issued, or a person in that county summoned as a garnishee, before process can legally issue, under the R. S. 1843, to another county, against a garnishee resident therein.

To authorize a judgment by default in a proceeding in foreign attachment, against a garnishee served with process in, and being a resident of, another county than that in which the writ of attachment was issued, it is necessary, under the R. S. 1843, that property of the absconding debtor shall have been attached, or a garnishee served with process, in the latter county.

ERROR to the *Wayne* Circuit Court.Saturday,
November 29.

BLACKFORD, J.—*Isham Keith* took out a writ of foreign attachment against *Henry S.* and *Samuel M. Blackford*. This writ was issued by the clerk of the *Wayne* Circuit Court, on the 27th of *March*, 1847, was directed to the sheriff of *Wayne* county, and was afterwards returned, that the defendants had no property in that county.

Another writ of foreign attachment, in the same case, was issued by the clerk of said *Wayne* Circuit Court, on the 12th of *April*, 1847, directed to the sheriff of *Henry* county, which writ was afterwards returned levied on certain real estate.

On the 22d of *April*, 1847, a summons was issued by the clerk of said *Wayne* Circuit Court, directed to the sheriff of *Vigo* county. This summons commanded the sheriff, to whom it was directed, to summon *John Reinhard* to appear at the then next term of the *Wayne* Circuit Court, as garnishee in said attachment-suit, to answer such questions as should be put to him touching the property, &c., of said attachment-defendants in his possession. This summons against *Reinhard*, as garnishee, was, as shown by the return, duly executed by the sheriff of *Vigo* county, on the 29th of *April*, 1847.

At the *September* term, 1847, of said *Wayne* Circuit Court, an order of publication was made in said attachment-suit, and, at the same time, a default was entered against *Reinhard* as garnishee.

Nov. Term,
1851.

REINHARD
v.
KEITH.

At the *March* term, 1848, of said *Wayne Circuit Court*, judgment was rendered by default against the attachment-defendants for 270 dollars. There was, also, at the same term, a judgment by default rendered against *Reinhard*, as garnishee, for 450 dollars.

Reinhard has sued out this writ of error.

One of the objections made by *Reinhard* to the judgment against him is, that the summons in the case issued by the clerk of the *Wayne Circuit Court*, and directed to the sheriff of *Vigo* county, was not authorized by the statute.

The act relative to domestic attachments enacts, that when the estate to be attached is in different counties, or when the debtors or bailees of the absconding debtor reside in different counties, the jurisdiction of the Circuit Court shall extend to such counties, and sundry writs of attachment, and of process against garnishees, may be issued and executed in such counties. But no judgment shall be given against the estate of the absconding debtor, or against such garnishees, unless the writ of attachment shall have been executed on some property belonging to the absconding debtor, situate in the county where the suit was commenced, or unless process shall have been served upon some garnishee therein residing or found, by the officer executing such process. R. S. p. 765. There are similar provisions in the foreign attachment act. R. S. pp. 772, 774.

These acts do not authorize the proceeding in the present case against *Reinhard*. There was here no attachment of property in the county where the writ of attachment issued, nor was there any person in that county summoned as garnishee.

The plaintiff relies upon the following provision in the domestic attachment act, to-wit: "Proceedings may be had against the garnishee in all cases where the writ of attachment is returned 'no property found,' in like manner as if property of the debtor had been attached by virtue of such writ." R. S. p. 767. But that provision, supposing it to be applicable to foreign attachment suits,

has reference, we think, only to the summoning of a garnishee who is resident in the county where the attachment issued.

Nov. Term,
1851.

THE STATE
v.
ARMSTRONG.

We are, therefore, of opinion that the summons in this case against *Reinhard* was issued without authority, and the judgment by default against him is erroneous.

Per Curiam.—The judgment is reversed with costs.
Cause remanded, &c.

S. B. Gookins, for the plaintiff.

W. Henderson, for the defendant.

THE STATE v. ARMSTRONG.

3	139
171	6

In an indictment for suffering a horse to be run in a horse-race along a public highway, the *termini* of the highway need not be stated.

ERROR to the *Tippecanoe* Circuit Court.

Tuesday,
December 2.

SMITH, J.—Indictment against the defendant in error for suffering his horse to be run along and upon a public highway in the county of *Tippecanoe*. The indictment was quashed on motion.

The only objection which appears to have been taken to the indictment, was, that the *termini* of the highway were not stated. This point has been decided in the case of *The State v. Burgett*, Ind. R. 340 (1). In an indictment for permitting a horse to be run in a horse-race along a public highway, the *termini* of the highway need not be stated.

Per Curiam.—The judgment is reversed with costs.
Cause remanded, &c.

W. F. Lane, for the state.

(1) 1 Carter's Ind. R. 479. The same point is also decided in *The State v. Brown*, id. 532.

Nov. Term,
1851.

BOYLAN
v.
WHITNEY.

BOYLAN v. WHITNEY and Another.

To an action brought upon a judgment rendered in another state, the defendant may show, by evidence *dehors* the record, that he was not within the jurisdiction of the Court at any time between the commencement of the action and the recovery of the judgment; and that an attorney who undertook to appear for him, had no authority to do so.

The Court has no right to exclude such evidence because the deposition containing it contains also evidence tending to prove that the judgment was rendered upon a partnership-debt, and that the defendant's partner employed the attorney on behalf of, and that judgment was rendered against, the firm.

Tuesday,
December 2.

ERROR to the *Carroll* Circuit Court.

SMITH, J.—The defendants in error brought an action of debt against *John Boylan* and *Samuel Boylan*, upon several judgments rendered in the state of *New York*.

The suit appears to have been prosecuted against *John Boylan* alone. *Samuel* was not served with process.

John Boylan pleaded, *inter alia*, as follows:

That said several judgments in the declaration mentioned, were one and the same judgment; that before the commencement of the suit in which said recovery was had, and during the whole progress of the suit until said recovery was obtained, the said defendant, *John Boylan*, was a resident of the state of *Indiana*, and was not, at any time during said period, within the limits of the state of *New York*; that he was not served with process either by arrest or otherwise; that he had no personal notice of the pendency of the suit; and that he did not appear, or authorize an attorney to appear, to said action on his behalf.

To this plea the plaintiffs replied that the said defendant, *John*, did appear to said action by his attorney, and issue was taken upon the replication.

The issues were all found for the plaintiffs, and a judgment was rendered accordingly.

The plaintiffs gave in evidence the record of a suit in the Supreme Court of the state of *New York*, which resulted in the judgment now sued upon.

The declaration was in assumpsit against *John Boylan* and *Samuel Boylan*; and the record states that the said *John* and *Samuel* appeared by *Benjamin F. Harwood*, their attorney, and pleaded the general issue. It also appears, by the record, that, at each of the subsequent proceedings in the cause, the said defendants appeared by their said attorney.

Nov. Term,
1851.

BOYLAN
v.
WHITNEY.

This record being all the evidence offered by the plaintiffs, the defendant then offered to read in evidence the deposition of *B. F. Harwood*. In this deposition *Harwood* stated that he appeared as the attorney of the said *John* and *Samuel*, in the action above mentioned, without any communication with the said *John* on the subject. He said he appeared at the request of *Samuel Boylan*, who stated to him that he and *John* were partners in the business out of which the suit arose, and that the business had been left with him, *Samuel*, to settle up. He had no other authority than this for his appearance. In answer to a question put to him by the plaintiffs, the deponent said: "*John Boylan* and *Samuel Boylan* were partners in the subject matter of the suit. By the laws of *New York*, one partner has a right to employ an attorney to defend a suit brought against the firm, for all the members of the firm, in respect to their partnership transactions." So much of this answer as respects the law of *New York*, had been previously suppressed on the motion of the defendant.

The defendant also offered to prove by other witnesses that from the year 1840, until 1849, the defendant had been a resident of the state of *Indiana*, and had never, within that period, been within the territorial limits of the state of *New York*.

The action in *New York* was commenced in 1843, and the judgment was rendered in 1844.

All the evidence thus offered by the defendant was excluded by the Court.

It has been settled by the case of *Shelton v. Tiffin*, 6 How. U. S. R. 163, and several recent decisions of this Court, that in actions upon judgments rendered in an-

Nov. Term,
1851.

OWINGS
v.
OWINGS.

other state, a defendant may show, by evidence *dehors* the record, that he was not within the jurisdiction of the Court, and that an attorney who undertook to appear for him had no authority to do so (1). The evidence offered by the defendant in this case to that effect, ought, therefore, to have been permitted to go to the jury. We think the Court erred in excluding it, notwithstanding a part of it tended to show that *John* and *Samuel Boylan* were partners. Even if one partner has authority to employ an attorney for the firm, in an action brought against the firm, a point of law which need not now be decided, the evidence of partnership is not conclusive, and it would only have presented another question for the jury.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt, for the plaintiff.

H. Allen and *Z. Baird*, for the defendants.

(1) See *Horner v. Doe*, 1 Carter's Ind. R. 130.—*Sherrard v. Nevius*, 2 id. 241. See, also, *Bliss v. Wilson*, 4 Blackf. 169.—*Smith v. Myers*, 5 id. 223.—*Wort v. Finley*, 8 id. 335.

OWINGS and Others v. OWINGS.

A son being the owner of the undivided half of a tract of land, purchased for his father the other half, the latter furnishing the means, but took the deed in his own name; it being understood that the father would, in a short time, remove from *Ohio* to the land, when they would divide the tract to suit them. The father did remove to the land, the division was made, and the father took possession of his half; but no deed was executed to him. Afterwards, the son having paid certain money for the father, it was agreed between them in writing, in consideration thereof, that the title to the father's share of the land should remain in the son, and that the father and his wife should have the privilege of occupying the same during their lives. *Held*, that the trust-estate of the father was extinguished by the execution of the said writing.

Tuesday,
December 2.

ERROR to the *Grant* Circuit Court.

SMITH, J.—The bill in chancery filed in this case charges, substantially, the following facts :

In the year 1836, *George W. Owings*, a son of the complainant, and one *Carter* entered two half-quarter sections of land at the land office at *Fort Wayne*. During the same year, at the complainant's request, *George W. Owings* purchased the undivided interest of *Carter* in the quarter section for the complainant, the latter paying for it. *Carter*, however, made the deed to *George W. Owings*, it being understood that the complainant, who then resided in *Ohio*, would, in a short time, remove to the land so purchased, and that he and the said *George* would then divide the whole tract in such manner as would suit them. The complainant did, during the same year, remove to the land, and a division was made, the complainant taking possession of his half, which possession he still retains.

Nov. Term,
1851.

OWINGS
v.
OWINGS.

The bill then charges that as the said *George* was a son of the complainant and the latter had full confidence that he would faithfully fulfill the trust thus vested in him, the complainant did not insist upon a deed being made to him, and none was made; that, in 1845, *George* married *Ruth Owings*, by whom he had two children, who are infants, and that *George* died in 1847, without having made a conveyance to the complainant.

Ruth Owings answered, saying that she has no personal knowledge of the facts relating to the purchase of the land, but is informed and believes that *George* purchased the land of *Carter* for his own use; and that if the complainant furnished the money it was in payment of a debt he owed *George*. She also states that though the complainant is in possession of the land in question, she is informed and believes that he is in upon a lease for life only, or by a privilege which *George* gave the complainant and his wife to occupy the same during their lives.

A guardian *ad litem* filed the usual answer for the infant defendants.

The cause was set down for hearing on the bill, answers, and depositions, and the Court decreed a deed to the complainant.

Upon an examination of the testimony taken in the

Nov. Term,
1851.

REDMAN
v.
TAYLOR.

cause, we are of opinion that this decree should not have been made. The principal facts charged in the bill are, it is true, sufficiently proved; but there is also proof, that, in consideration of *George* having paid certain money for the complainant, it was agreed by them that the title to this land should remain in *George*, and that the complainant and his wife should have the privilege of residing on the part occupied by them during their lives. A bond or lease to this effect was executed by *George*, and taking all the testimony together we think it proves that this was the real nature of the agreement as understood between the parties during the life-time of *George*. Such being the case, the heirs of *George* cannot be considered as holding the title in trust for the complainant.

Per Curiam.—The decree is reversed with costs. Cause remanded, with instructions to the Circuit Court to dismiss the bill.

J. Brownlee, for the plaintiff.

T. J. Sample, for the defendants.

REDMAN v. TAYLOR.

Trespass *quare clausum fregit*. Pleas—1. The general issue; 2. *Liberum tenementum*; 3 and 4. Leave and license for a special purpose; 5. Leave and license generally. Replication to the second plea, *De injuria*; to the third and fourth, That the defendant committed unnecessary damage; to the fifth, *De injuria*. Rejoinder to replication to third and fourth pleas, that the defendant committed no unnecessary damage, &c. Verdict for the plaintiff on the issue raised by the third and fourth pleas, and for the defendant on that raised by the fifth plea. Judgment for the defendant. *Held*, that the judgment was right.

The plaintiff will not be allowed, after verdict, to amend his replication, or to file an additional one.

Tuesday,
December 2.

APPEAL from the *Tippecanoe* Court of Common Pleas.

PERKINS, J.—*Peter Redman* brought an action of trespass against *James Taylor*, complaining that said defendant, on, &c., at, &c., with his servants, with force and arms, entered upon the premises of said plaintiff and

broke down, trod under foot, and damaged, a large quantity of corn, &c., of the value, &c., to his damage, &c.

Nov. Term,
1851.

The defendant pleaded—1. The general issue; 2. *Librum tenementum*; 3 and 4. That he entered for the purpose of seeding the premises with wheat, and with the leave and license of the plaintiff for that purpose, and that he did no unnecessary damage, &c.; 5. Leave and license generally.

REDMAN
V.
TAYLOR.

Replication to the second plea, *de injuria*; to the third and fourth, that the defendant committed unnecessary damage; and to the fifth, *de injuria*.

Rejoinder to the replication to the third and fourth pleas, that the defendant did not do unnecessary damage, &c.

Issues were duly joined, and tried by a jury, who found for the plaintiff upon the issue on the rejoinder to the replication to the third and fourth pleas, and assessed his damages at 6 dollars and 37½ cents; and for the defendant upon the issue on the replication to the fifth plea.

The Court rendered final judgment for the defendant.

The fifth plea was more comprehensive than the third and fourth, and was a bar to the whole action. It was found for the defendant, and the final judgment in his favor was, therefore, right, irrespective of all the other issues in the cause.

There might, perhaps, be a case where the finding of the jury upon different issues in it would be so repugnant as to render such finding void, and require it to be set aside for that cause; but this is not such a one.

After the verdict was returned by the jury, the plaintiff asked leave to amend his replication to the fifth plea, making it deny the general leave and license, assert a special one, and charge unnecessary damage; but the Court refused the leave.

This ruling of the Court was in accordance with a late decision of this Court in the case of *Seivers v. McCall*, 1 Carter's Ind. R. 393.

Nov. Term,
1851.

WILCOX
v.
DUNCAN.

Per Curiam.—The judgment is affirmed with costs.
D. Mace and *W. C. Wilson*, for the plaintiff.
R. C. Gregory and *R. Jones*, for the defendant.

WILCOX v. DUNCAN and Another, Executors.

Assumpsit against executors upon the common counts for money had and received by the testator. Pleas—1. The general issue; 2. That the causes of action did not accrue within five years before the R. S. 1843 came into force; 3. That the causes of action did not accrue within six years; 4. That the causes of action did not, nor did either of them, accrue within six months before the commencement of the suit; and if the term of six years expired after the time of the decease of the testator, the suit was not brought within eighteen months after his decease. Replication to the last three pleas—that the testator, during his whole life, concealed from the plaintiff the cause of action; and issue on the replication. The suit was commenced in 1849. The plaintiff offered to prove, on the trial, by a competent witness, that in 1842 the testator admitted to him the existence of a part of the cause of action; but the Court refused to hear the testimony. *Held*, that the testimony was admissible.

Tuesday,
December 2.

ERROR to the *Hendricks* Probate Court.

PERKINS, J.—Assumpsit upon the common counts.

The following bill of particulars of the plaintiff's claim was filed:

“*Hardin H. Wilcox v. Kreigh and Duncan*, executors of the estate of *Samuel A. Duncan*, deceased.

1846. To money had and received,	\$1,000 00
To the price and value of certain promissory notes retained and collected by <i>Duncan</i> in his life-time,	1,000 00
To the price and value of two horses,	200 00
To interest on the above account, . .	500 00

\$2,700 00.”

The declaration charges the indebtedness to have accrued in the life-time of *Samuel A. Duncan*. Pleas—1.

That *Samuel A. Duncan* did not undertake, &c., in his lifetime; 2. That the causes of action did not accrue within five years before the coming into force of the R. S. 1843; 3. That the causes of action did not accrue within six years; 4. "And for a further and fourth plea in this behalf, said defendants say, *actio non*, because they say that the said several supposed causes of action in said plaintiff's declaration mentioned, did not, nor did either of them, accrue at any time within six months next before the commencement of this suit; and if the said term of six years expired after the time of the decease of said *Samuel A. Duncan*, that this action is not brought within eighteen months after the time of the decease of said *Samuel A. Duncan*."

Nov. Term,
1851.

WILCOX
v.
DUNCAN.

The plaintiff replied to the second, third, and fourth pleas that said *Samuel A. Duncan*, deceased, during his whole life, concealed from the knowledge of the said plaintiff the cause of action, &c.

The defendants rejoined that said *Duncan* did not conceal, &c.

This latter issue was formed with reference to section 113, p. 688, of the R. S. 1843.

On the trial, the plaintiff offered his first witness to prove that in 1842 *Samuel A. Duncan* admitted to him the existence of a part of the cause of action. The suit was commenced in 1849. The Court refused to hear the proof, and the defendant had judgment in his favor.

We can see no reason why the testimony of the witness should not have been heard. The general issue was in, and the plaintiff was bound to prove the existence of his cause of action; and the question upon the issue of concealment would have arisen afterwards. We see nothing showing incompetency on the part of the witness offered, and no such objection is made. Had the evidence offered been heard, the plaintiff might have followed with other that would have made out his case upon all the issues, but which, that offered having been rejected, it was not proper to present or offer to present. There might be cases, where legitimate evidence was offered

Nov. Term,
1851.

MANVILLE
v.
McCoy.

and rejected, in which a Court of error might not be able to say the party had been injured by such rejection, unless he showed that he had other evidence ready to offer, which, with that rejected, might make out his case. But we think this is not one of them.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. C. Nave, for the plaintiff.

J. S. Harvey, for the defendant.

MANVILLE v. MCCOY.

Where a mechanic undertakes to do a job of work for a specific sum, within a time appointed by contract, and, having done a part, fails to complete the rest within the time appointed, by reason of which the employer is compelled to hire another to complete it, the employer has the right, if the hire of the mechanic last employed exceeds the price agreed upon by the contract for the same work, to deduct such excess from the amount due, according to the contract price, to the first mechanic, for the work actually done by him.

The employer has also the right, if the work done under the contract was executed in an unworkmanlike manner, to have the amount which it was worth less than if done in a workmanlike manner, deducted from the contract price for the same work.

The employer has also a right, upon suit brought by the first mechanic for the work done by him, to show (at least, if he has pleaded or given notice of the defense,) other special damages which he has sustained by the plaintiff's breach of the contract.

If the work has been done in an unworkmanlike manner, but no damages have resulted from its non-completion at the time appointed, and the expense of finishing it has not exceeded the contract price for the same work, the plaintiff should recover the reasonable value of the work done by him, according to its quality, not exceeding the contract price for the same.

If an employer, upon his own judgment, furnishes a mechanic defective materials for a job, and directs them to be used at all events, he cannot afterwards object that the work, on account of the defectiveness of the materials, is of an inferior quality.

Tuesday,
December 2.

ERROR to the *Jefferson* Circuit Court.

PERKINS, J.—*McCoy* sued *Manville* before a justice of the peace, on the following account :

" *Butler Manville* to *William McCoy*, Dr.

Nov. Term,
1851.

MANVILLE
v.
McCoy.

"For plastering 700 yards for the defendant by the plaintiff upon the defendant's brick dwelling-house in *Milton* township, *Jefferson* county, *Indiana*, in the fall of the year 1848; said work including lathing, but not materials, and being worth per yard 12½ cents, which will make the damages hereby demanded \$87 50."

The cause went by appeal to the Circuit Court, was there tried by a jury upon the general issue, and the plaintiff obtained a verdict for a fraction over 25 dollars. A motion for a new trial being overruled, judgment was entered on the verdict. The evidence and instructions are upon the record. The evidence tends to establish that the plastering sued for was done under a special contract, by which *McCoy* was to plaster *Manville's* house at a certain price per yard, and within a certain time; that he failed to complete the work within the time; that *Manville* procured another person to complete it; and that the part performed by *McCoy* was not done in a workmanlike manner; but no amount of damage accruing to *Manville* from *McCoy's* failure to complete the work in time is shown, nor does it appear that *Manville* paid any higher price for the completion of the job than he had agreed to pay *McCoy* for the same work.

The Court instructed the jury that "if they found there was a special contract between the parties, by which *McCoy* agreed to plaster *Manville's* house upon certain terms, and within a specified, or a reasonable time, and in a workmanlike manner, to be paid for on the completion of the job; and that, after part performance, *McCoy* failed or refused to perform the balance within the time, or in the manner agreed upon, without any fault or default of *Manville*, and the work done, or part performance, was of such a nature that *Manville* was necessarily compelled to accept it, *McCoy* is not entitled to recover for the work done; but if the work done was of such a nature that *Manville* could accept or reject it at his option, and he chose to accept it, *McCoy* is entitled to recover for the reasonable value of the work."

Nov. Term,
1851.

MANVILLE
v.
McCoy.

What we have said in *Epperly v. Bailey*, at this term, shows that *Manville*, the defendant below, has no ground to complain of these instructions. He had a right, in the Circuit Court, in defending this suit, to show the amount he was to pay *McCoy* for plastering the whole house, (taking it that there was a special contract); to show that *McCoy* failed to perform the whole; and then to show how much he had been compelled to pay another to finish *McCoy's* job. This amount (supposing *McCoy's* failure to have been his own fault,) *Manville* had a right to have deducted from the whole amount he was to pay *McCoy*, if it exceeded the price he was to pay him for the same work. If it did not exceed, he would not be bound to adopt this mode in determining the amount *McCoy* was to recover. He then had a right to show how much the part performed by *McCoy* was worth less than the contract price on account of its not having been done in the manner required by the contract, and have such sum deducted from the amount that the latter would have recovered for performing such part at the contract price. He also had a right, at least, by pleading or giving notice of such a defense, to show the damage he had sustained by *McCoy's* breach of contract, and have its amount deducted from his claim. But as *Manville* did not prove that he had paid, for finishing the job, more than his contract price for the same portion of the work with *McCoy*, and did not prove any amount of damage resulting from his failure to complete the work at the time stipulated, it only remained for the jury to give the plaintiff in this case the reasonable worth, according to its quality, of the work performed by him. Hence, *Manville* cannot complain of the instructions given.

Upon the evidence, conflicting as it is, we cannot disturb the judgment below.

This principle is laid down by the attorney for the plaintiff in error, viz: that where a mechanic undertakes to do a job of work, the proprietor furnishing the materials, he is bound to make a good job or get no pay, even though the materials be of so inferior a description that good

work cannot be made out of them; because, he argues, it is the mechanic's own fault if he uses such materials. He objects to an instruction of the Court in this case that conflicts with this principle.

Nov. Term,
1851.

TRIMBLE
v.
THE STATE.

We think the doctrine contended for, as a general proposition, is not correct; though it may be in some cases. If the proprietor furnished the materials under the direction, and upon the judgment of, the mechanic, and the work completed from them was, on the whole, of no advantage to him, perhaps the mechanic should receive no pay, because it would be his own fault that he used poor materials. But if the proprietor did not so furnish them, but did it upon his own judgment, and directed the mechanic to use them at all events, it would not be the fault of the latter, if, from bad materials, the work, when done, was of an inferior quality. In this case, it is not shown that the materials were used upon the judgment of the plasterer, and there is some evidence tending to show the contrary.

We see no error in this case (1).

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

J. W. Chapman, for the plaintiff.

J. R. Trozell, for the defendant.

(1) See *McKinney v. Springer*, ante, p. 59.—*Epperly v. Bailey*, ante, p. 72.—*Heaston v. Colgrove*, post.

TRIMBLE v. THE STATE.

A recognizance taken by the sheriff for the appearance of a person indicted, to answer the accusation, is not void, under the R. S. 1843, from the circumstance, alone, that the amount of bail required was not indorsed on the process.

APPEAL from the *Decatur* Circuit Court.

PERKINS, J.—*Charles Sanders* was indicted in the *Decatur* Circuit Court for burglary. He was arrested by the

Tuesday,
December 2.

Nov. Term,
1851.

TRIMBLE
v.
THE STATE.

sheriff, and was discharged from the arrest by giving a recognizance for his appearance at the next term of the Court to answer to said indictment. *James H. Trimble* was his surety in the recognizance. *Sanders* failed to appear; a default was taken; and the present suit is a *scire facias* against *Trimble*, surety, on said recognizance.

Trimble obtained oyer of the recognizance, and pleaded that when the same was taken by the sheriff he had no lawful right, power, or authority to take it, or the acknowledgment thereof, "for this, to-wit, that said sheriff, at the time he" did said acts, "had no writ, or warrant of commitment, or other process whatever, against said *Sanders*, whereon any amount of bail required was specified or otherwise; wherefore said defendant says said recognizance was void," &c.

To this plea a general demurrer was sustained, and the state had judgment.

In support of the plea, *Trimble* relies on the following statutory provisions, R. S. p. 989:

"Sec. 22. It shall be the duty of the Circuit Court, at each term thereof, to make an order for the amount in which persons indicted shall be held to bail; and it shall be the duty of the clerk, on issuing process, to indorse thereon the amount of bail thus required.

"Sec. 23. If no such order of bail shall have been made, the officer to whom such writ is directed, may present the same, if the offense be bailable, to any associate judge of the county, either before or after the arrest of the defendant; and such judge shall indorse thereon the amount in which such officer shall take bail of such defendant, and bail may be taken by the officer accordingly."

The state relies upon section 34, p. 991, of the same statutes, to sustain the decision of the Court holding the plea insufficient, which section is:

"No action or proceedings on a recognizance, by *scire facias* or otherwise, shall be barred or defeated, nor shall judgment thereon be defeated or arrested by reason of any neglect or omission to note or record the same, or

any matters connected therewith; nor by reason of any defect in the form of the recognizance, if it sufficiently appear from the tenor thereof, and from the proceedings or otherwise, at what Court the party was bound to appear, and that the Court or magistrate before whom it was taken was authorized by law to take such recognizance, and that such party was in default in violation of the condition of his recognizance."

Nov. Term,
1851.

TRICKLE
v.
THE STATE

The sheriff has no power to fix the amount of bail; and a recognizance wherein said amount was fixed by him, would, therefore, probably be void. But the sheriff has a right to take a recognizance in a sum fixed by the Court, or an associate judge; and when he does take one in such a sum, we do not think it void by reason of an omission, in the proper officer, to indorse such sum upon the writ. The plea, in this case, did not deny that the amount of bail had been fixed by the proper authority, nor that the sheriff took it in the amount fixed; but it simply denied that the amount had been indorsed upon the writ, and was, therefore, as we think, insufficient. The consequence is, that the judgment below must be affirmed with costs (1).

Per Curiam.—The judgment is affirmed with costs.

A. Davison, for the appellant.

J. S. Scobey, for the state.

(1) The Statute of 12 Geo. 1, c. 29, prohibited the sheriff from arresting the defendant for a debt, unless "the debt was sworn to by the plaintiff, and the sum sworn to be due and for which the defendant was holden to bail was marked on the writ." The declaration upon a bail-bond did not aver that the debt was sworn to, nor that the writ was thus marked; and, upon demurrer, it was insisted that unless both had been done, the bail-bond was void. The Court of *King's Bench* held that it was not requisite to the validity of the bail-bond that either should have been done. *Whiskard v. Wilder*, 1 Burr. 330.

And where a bail-bond was taken by the sheriff in a larger amount than was authorized by the statute, it was held that this did not invalidate the bond. *Id.*—*Norden v. Horsley*, 1 Wils. 69.

The statute was, in these cases, construed to be merely directory.

Nov. Term,
1851.

BERRY
v.
MAKEPEACE.

3	154
150	328
150	898
30	154
163	898

BERRY v. MAKEPEACE.

A justice of the peace has no authority to render a judgment bearing more than legal interest, even by the consent of the parties.

A judgment was rendered by a justice of the peace, while the statute of 1838 was in force, by the consent of the defendant, bearing 10 *per cent.* interest. *Held*, that this was not a valid contract under that statute for the payment of that rate of interest.

Where one of several defendants in such a judgment has paid 10 *per cent.* interest thereon, he is a proper party to sue for the excess paid over the legal rate.

In assumpsit against the judgment-plaintiff to recover an excess of interest received by him on the judgment over the legal rate, he pleaded to the declaration that he did not take and receive the same, nor did he promise, &c., within one year previous to the commencement of the suit. Upon this plea, the plaintiff took issue. *Held*, that the action not having been brought under the provisions of the statute, to recover the whole of the interest paid as illegal, the issue raised was an immaterial one. An action for money had and received lies at common law to recover back an excess of interest paid over that established by statute.

Wednesday,
December 3.

ERROR to the *Madison* Circuit Court.

SMITH, J.—Assumpsit by the plaintiff in error against the defendant in error upon a count for money had and received. A bill of particulars was filed with the declaration, showing that the demand was for an excess of interest over six *per cent.*, paid on three judgments for 100 dollars each, and one for 51 dollars and 99 cents, rendered by a justice of the peace against *Berry* and one *Williams*, and upon which judgment one *Kindle* became replevin-bail.

Pleas—1st. The general issue; 2d. That the defendant did not take and receive said money, nor did he promise, as in the declaration alleged, within one year previous to the commencement of the suit. The plaintiff replied to the second plea, that the defendant did demand and receive said money within one year, &c.

The trial of these issues was submitted to the Court, and judgment was rendered for the defendant.

Transcripts of the judgments were offered in evidence. They were all rendered on the 5th of *August*, 1840, and were entered on the docket of the justice in the following form:

"Now come the parties, by consent, and the defendant confesses a judgment. Therefore, it is considered that the plaintiff recover of the defendants, *Berry* and *Williams*, a confessed judgment for the sum of 100 dollars and interest at the rate of 10 *per cent.*, *per annum*, until paid. To be paid in good bank paper, by agreement of the parties," &c.

Nov. Term,
1851.

BERRY
v.
MAKEPEACE.

There were receipts upon these judgments, showing that 100 dollars had been made by an execution, and that various payments had been made by *Berry*, and *Kindle*, the replevin-bail, previous to the 7th of *September*, 1848, which, with the money made by the execution, amounted to 229 dollars and 21 cents. On the day last named *Makepeace* received from *Berry* 300 dollars more, which he accepted as a satisfaction of said judgments.

The justice who rendered the judgments was called as a witness by the defendant, and he stated that the judgments were rendered for a partnership debt due by *Berry* and *Williams* to *Makepeace*; that *Berry* and *Makepeace* appeared before him voluntarily, and *Berry* proposed to give *Makepeace* these judgments bearing 10 *per cent.* interest, provided *Makepeace* would agree to receive payment in bank paper; and that the judgments were so rendered pursuant to the agreement of *Berry* and *Makepeace*, *Williams* not being present.

The plaintiff in error contends that the justice of the peace had no authority to render a judgment bearing more than legal interest; and that, though there was a statute in force at the time, which authorized a contract for the payment of 10 *per cent.* interest, if made in writing and signed by the party to be charged, these judgments are not such contracts.

We think these positions are correct, and that *Berry* was entitled to recover back, in this action, the amount paid by him over and above the sums due on the judgments, calculating the rate of interest at six *per cent.*

The defendant in error contends that the suit was not brought by the proper parties; that *Williams* and *Kindle* should have been joined with the plaintiff. But,

Nov. Term,
1851.

OXFORD
v.
McFARLAND.

as it appears that the payment of 300 dollars on the 7th of *September*, 1848, was made by *Berry*, we think he may recover in his own name so much of that sum as remains after deducting the amount actually due on the judgments. The balance was received by the defendant without consideration, and having no right to it, he may be considered as holding it for the person from whom he received it.

The issue made by the second plea is an immaterial one. That plea might have been applicable if the action had been brought under the statutory provision, (R. S. c. 31, s. 30, p. 581,) to recover the whole of the interest paid as illegal, but such is not the case. This suit is for the excess of interest paid, which may be recovered back in this form of action, by the common law, and independently of the statute of the state. *The State Bank v. Ensminger*, 7 Blackf. 105.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Davis, for the plaintiff.

D. Kilgore, for the defendant.

OXFORD, Administrator, v. McFARLAND.

A son-in-law, living with the parents of his wife, cannot recover for occasional services performed in that capacity, without proof of an express contract that they were to be paid for.

Wednesday,
December 3.

ERROR to the *Vermillion* Circuit Court.

SMITH, J.—Assumpsit by *McFarland*, the defendant in error, against the administrator of *Abel Oxford*. The declaration contains counts for goods sold to, and work and labor performed for, the decedent, in his life time, and for work and labor performed for the administrator. A bill of particulars was filed with the declaration, stating the debt to be for nine months' labor, at 13 dollars per

month, six days' labor making fence, at three dollars and fifty cents, and 400 bushels of corn, at the price of 64 dollars.

Nov. Term,
1851.

OXFORD

v.

McFARLAND.

The defendant pleaded the general issue, and, also, payment and set-off. He also filed a bill of particulars.

The plaintiff below obtained a verdict and judgment for 52 dollars, and costs.

The evidence is all upon the record, and we are of opinion it does not sustain the judgment.

The only item of indebtedness we consider proved by the plaintiff, is one of about 61 dollars, due for a quantity of corn sold the decedent; and the defendant proved debts due by *McFarland* to the decedent, to an equal or greater amount.

McFarland married the daughter of the decedent, and lived with his wife at the house and on the farm of the latter, during the first year after his marriage. There was an attempt to prove an account for work and labor as a hand upon the farm during this period, and the jury probably based their verdict on the supposition that a portion of this account should be allowed. We do not think the evidence authorized the recovery of any portion of it. There is no proof of the performance of labor for any definite period of time, or to any particular amount. *McFarland* was seen occasionally working upon the farm; but it is well settled that a son or son-in-law living with the parents, as a member of their family, cannot recover for occasional services performed in that capacity, without proof of an express contract that they were to be paid for.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. A. Wright, for the plaintiff.

A. Kinney and *J. P. Usher*, for the defendant.

Nov. Term,
1851.

IRONS v. HUSSEY.

IRONS
v.
HUSSEY.

An action at law was submitted, by agreement, to the president and one of the associate judges of the Circuit Court, the other being absent, for trial, and, upon hearing the evidence, the president was of opinion that the plaintiff should have judgment, and the associate that the defendant should have judgment; and they could not agree. *Held*, that under such circumstances, the cause should have been continued for a new trial.

Wednesday,
December 3.

ERROR to the *Hendricks* Circuit Court.

SMITH, J.—This was an action of assumpsit commenced before a justice of the peace. On appeal, in the Circuit Court, the cause was submitted to the Court, without the intervention of a jury, and judgment was rendered for the defendant.

By a bill of exceptions it appears that when the cause was heard, there were only two judges present, the president judge and one associate judge; and that, after hearing the evidence and the arguments of counsel, the president judge was of opinion that the plaintiff was entitled to a verdict, and the associate judge was of opinion the judgment should be for the defendant. There being this difference of opinion, the plaintiff moved the Court to set aside the submission of the cause, and direct a new trial, but the Court, being of opinion that a judgment for the defendant was the proper legal result of this division of the judges, overruled the plaintiff's motion, and rendered judgment accordingly.

The evidence is not set out in the record, and the only question before us is, whether, upon the disagreement of the judges, the defendant was entitled to a judgment, it being expressly stated that this was the sole ground upon which it was rendered.

The statute provides that when the parties in any suit shall, by agreement, submit any matter to the determination of the Court, such Court may hear and determine the same, and give judgment therein, without the intervention of a jury. R. S. c. 40, s. 316, p. 731. When a cause is submitted to the Court under this statutory pro-

vision, the finding of the Court takes the place of a verdict. *Priest v. Martin*, 4 Blackf. 311. In such a case as the present one, there being an equal division of the judges, there could be no finding by the Court, and, consequently, a judgment could not be rendered for either party. When a jury disagrees there can be no judgment, because the jury is unable to return a verdict. The verdict must be the verdict of the jury, which it is not if it is not agreed to by all the jurors. When an issue is submitted to the Court, there must, upon the same principle, be a finding by the Court in favor of one party or the other, which, it seems clear, there cannot be, if there are but two members of the Court, and they disagree as to such finding. There can be no finding by the Court unless it is agreed to by the judges, or, at least, a majority of them. Under such circumstances, the cause should be continued for a new trial.

Nov. Term,
1851.

BATES
v.
HALLIDAY.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

A. A. Hammond and H. O'Neal, for the plaintiff.

C. C. Nave, for the defendant.

BATES v. HALLIDAY.

A partner may, with the consent of his co-partner, make a valid arrangement with a creditor of the former, that a debt due by the creditor to the partnership may be discharged by deducting it as a payment as far as it will go, from the debt of the partner to him.

A plea of payment contained also two items of set-off, one of which was clearly inadmissible as such. *Held*, that the plea was not bad, on general demurrer, on that account.

ERROR to the *Tippecanoe* Court of Common Pleas.

Wednesday,
December 3.

SMITH, J.—Covenant on an agreement under seal, whereby *Bates* sold to *Halliday* his interest in a certain lot upon which was a distillery, &c., for 6,500 dollars. In consideration of said sale, *Halliday* bound himself to pay

Nov. Term,
1851.

BATES
v.
HALLIDAY.

Bates said sum of 6,500 dollars in manner following, to-wit: "2,700 dollars of the said sum of 6,500 dollars is hereby, by the consent of the parties, applied in liquidation, as far as it will go, of the amount in which the said *Bates* is now indebted to the said *Halliday*; 500 dollars in merchandise, 50 dollars' worth of which said merchandise is to be delivered at the expiration of each month from the 1st day of *May* next, until said sum of 500 dollars is paid; 650 dollars in barrels of rectified whisky, one-fourth to be paid in one month from the 1st day of *May* next, and another fourth at the expiration of each month thereafter, until the whole be paid; 800 dollars in barrels of high wines, one-fourth to be paid in one month from the 1st day of *May* next, and another fourth at the expiration of each month thereafter; 530 dollars by paying to *Ellsworth* that sum, being the balance due by *Bates* for the purchase-money of the premises; (he had bought them of *Ellsworth*;) and the remaining 1,320 dollars in cash by two equal payments, in six and twelve months." It was further agreed by the parties that a final settlement of all accounts between them should be had on or before the 1st day of *May* next, and, if it should appear that the present indebtedness of *Bates* to *Halliday* exceeded 2,700 dollars, with the claims which *Halliday* should then hold against *Bates*, the excess should be credited on the deferred payments, but *Halliday* should not, after the date of the agreement, purchase any outstanding claims against *Bates*, to offset against said payments; but that *Halliday* should have the right so to offset any payments he might make for the expenses and outlays of *Bates*, in fitting up and running said distillery.

This agreement was dated *April* 2d, 1848, and the suit was commenced on the 23d of *June*, 1848.

The plaintiff assigned the following breaches of the covenant:

1st. That the defendant refused to make a settlement on the 1st of *May*, and that, at the date of said agreement, as well as at said 1st day of *May*, there was due from *Bates* to *Halliday* only 100 dollars; wherefore the

defendant was bound to pay to the plaintiff the residue of the sum of 2,700 dollars, to-wit, 2,600 dollars, which, it was agreed, should be applied in liquidation of the amount *Bates* was indebted to *Halliday*.

Nov. Term,
1851.

BATES
v.
HALLIDAY.

2d. The second breach is similar to the first.

Demurrers were sustained to these two breaches.

3d. That the defendant refused to settle, &c., and refused to pay said 2,700 dollars, though there was nothing due from the plaintiff to him.

4th. That the defendant refused to deliver the merchandise, whisky, and high wines, though demand was made, &c.

5th. That on the 23d of *June*, 1848, the plaintiff demanded of the defendant 50 dollars in merchandise, 162 dollars and 50 cents in whisky, and 200 dollars in high wines, then due under the agreement, and the defendant refused, &c.

6th. That the plaintiff was not indebted to the defendant in any sum on final settlement; and though he requested the defendant to settle on the 1st day of *May*, the defendant did then refuse, and has ever since refused, to settle, or to pay the plaintiff said sum of 2,700 dollars.

The defendant filed two pleas to the 3d, 4th, 5th, and 6th breaches. The plaintiff demurred generally to both pleas. The demurrer was overruled and the defendant had judgment thereon.

One of the pleas was as follows:

That at the date of the agreement set out in the declaration, the defendant and one *Beach* were partners in trade, and that, on the 15th day of *May*, the plaintiff was indebted to said firm, on the common counts, for goods sold, &c., 5,398 dollars and 93 cents, which said indebtedness the parties meant and intended should constitute an offset to said deferred payments; that, with a view to a settlement as stipulated in the agreement, on said 15th of *May*, the defendant furnished the plaintiff with a memorandum of the items of said indebtedness, and the plaintiff then admitted the amount was correct, and, with

Nov. Term,
1851.

BATES
v.
HALLIDAY.

the consent of said *Beach*, said sum was then and there appropriated and accepted, by said *Bates*, in liquidation and payment of said sum of 2,700 dollars, and said other sums to be paid by the defendant as in said agreement mentioned, to the said amount of 5,398 dollars and 93 cents; which facts the defendant pleaded in bar of the suit.

The plea also avers an indebtedness of the plaintiff to the defendant upon a bill of exchange for 148 dollars and 92 cents, and that the plaintiff was indebted to one *Rockwell*, on the common counts, 2,000 dollars, which indebtedness had been assigned by *Rockwell* to the defendant; which items of indebtedness the defendant pleaded by way of offset.

No question need be examined as to the sufficiency of the first and second breaches, as the third and sixth admitted proof of all the facts which could have been given in evidence under either of them, and, therefore, the plaintiff was not injured by the demurrer which was sustained.

The only question of importance presented, is, whether the plea above quoted was sufficient to bar the suit, on general demurrer. It is objected to the first branch of the plea that an indebtedness of the plaintiff to *Beach* and *Halliday*, is not a legal matter of set-off, in a suit by the plaintiff against *Halliday* alone; but we do not think this proposition is relevant to the facts averred. The plea alleges, in substance, as we understand it, that, in pursuance of a previous understanding of the parties, a portion of the debt due by the agreement set out in the declaration, and a larger amount of it than was due at the time this suit was commenced, had been paid by *Halliday* to the plaintiff, by means of an agreement whereby the plaintiff was released from the payment of a debt due by him to the firm of *Halliday* and *Beach*, and accepted such release in satisfaction of the debt due by *Halliday* to him. The partnership debt of the plaintiff to *Halliday* and *Beach* is not offered as a set-off, but the acceptance of the plaintiff of the cancellation of that debt as a payment of the debt due by *Halliday* to him, is pleaded in bar.

There seems to be no reasonable ground to doubt, that such an arrangement and payment of the debts due by *Bates* to the firm, and by *Halliday* to *Bates*, might be made, with the assent of *Beach*, or that it would be valid and binding on all the parties. One partner cannot, without the assent of the other members of the firm, transfer or sell the partnership effects for the payment of an individual debt, but, with such assent, he may. Coll. on Partn., 218.—*Whitney v. Dean*, 5 N. H. R., 190. We can see no reason, therefore, why such an agreement as is alleged in the plea, if actually executed as it is averred it was, should not be a bar to a subsequent action by *Bates* against *Halliday* for the debt thus satisfied.

The plea would have been objectionable, no doubt, on special demurrer. The debt alleged to have been assigned by *Rockwell*, was clearly inadmissible as matter of set-off, but, regarding all the plea but the first branch of it as surplusage, we think that, on general demurrer, it may be regarded as a sufficient plea of payment.

Per Curiam.—The judgment is affirmed with costs.

D. Mace, R. Jones, J. Pettit, and S. A. Huff, for the plaintiff.

G. S. Orth, E. H. Brackett, and Z. Baird, for the defendant.

Nov. Term,
1851.

FILLINGIM
v.
WYLIE.

FILLINGIM and Wife v. WYLIE and Others.

A bill will not lie by the children of an intestate before a final settlement of the estate and an order of distribution of the personal assets, against a third person for having received from the administrator personal property of the intestate, and wasted the same.

APPEAL from the *Posey* Probate Court.

SMITH, J.—This was a bill in chancery, filed by *Elizabeth, Nancy, and Samuel Wylie*, suing by their guardian. It alleges that *James Wylie*, who was the father of the

Wednesday,
December 3.

Nov. Term,
1851.

FILLINGIN
v.
WYLIE.

complainants, died in 1838, leaving five children, to-wit, the complainants and *George* and *Lytle Wylie*, all then, and still, being minors; that their said father left a farm of 160 acres, 53 acres being cleared land, upon which the complainants and the other children continued to reside with their mother, *Sarah Wylie*; that their said father also left personal property amounting to about 558 dollars more than was necessary to pay his debts, and, he dying intestate, his brother, *Lytle Wylie*, took out letters of administration; that the widow, *Sarah Wylie*, was entitled to 100 dollars of said personal assets, which portion, with the income from the farm, was insufficient to support the family, and that the administrator, in consequence of her destitute condition, permitted the widow to keep a portion of the personal property of the intestate, at its appraised value, amounting to 558 dollars; and also advanced to her, at different times, money and goods of the estate to the value of about 80 dollars; that 17 acres of land was cleared with their money, costing them 88 dollars, which increased the cleared land of the farm to 70 acres; that the said widow, *Sarah*, intermarried with *Fillingin*, in 1844, and, since said marriage, she, with her husband, have had the use of said land, which was worth 1 dollar and 75 cents per acre for the portion of it that was cleared.

The bill further charges that no guardian was appointed for the complainants until 1845; that said money and personal property was received by said *Sarah*, for the sole use and benefit of the heirs of said *James Wylie*; that said *Sarah* and her husband, *Fillingin*, have wasted and converted the whole of said property to their own use; and that the complainants have demanded a settlement of *Fillingin* and wife, which they have refused to make.

Prayer for an account to be taken between the complainants and the defendants, and that the latter be decreed to pay the former what is equitable.

The defendants, *Fillingin* and wife, answered. They admit the death of *James Wylie*, &c.; they say the personal property of the intestate, which came to the hands of the administrator, amounted to about 2,100 dollars,

and that the debts of the estate did not exceed 500 dollars; that the widow's distributive share was about 600 dollars, and the administrator, therefore, allowed her to take said personal property at its valuation, as her portion of said estate; they deny that they, or either of them, received any other money, or property, or anything whatever, in trust for the complainants. They say, that, after the widow had thus received her portion, the administrator wasted the greater part of the estate remaining to be distributed. They deny that any part of the land was cleared with the money of the complainants. They admit the occupation of said land, with said heirs, until the dower was assigned in 1846, and deny that they have since occupied any portion of it. They allege that, at the death of their father, said *Elizabeth* was about six years, said *Nancy* four years, and said *Samuel* ten months old, and that the cost of their maintenance greatly exceeded the amount of property taken by their mother, and the value of the rents. They further allege that after the marriage, the complainants, by their guardian, sued said *Fillingim* for the rent of the farm for the years 1844 and 1845, in which suit he filed an offset, and at the *March* term, 1846, of said Circuit Court, the complainants recovered a judgment for 16 dollars, which the defendants have paid.

The cause was heard upon the bill, answer, exhibits, and depositions, and the Court rendered a decree in favor of the complainants for 187 dollars and 39 cents. From that decree the defendants appeal to this Court.

An exhibit accompanying the bill, sets out certain items of personal property, which the administrator permitted the female defendant, as the widow of *James Wylie*, to take and retain at their appraised value. They consisted of household goods, and the implements and livestock of a farm.

From the proceedings of the administrator, which were read in evidence, it appears that he had filed, in the Probate Court, several accounts current purporting to show

Nov. Term,
1851.

FILLINGIM
V.
WYLIE.



Nov. Term,
1851.

FILLINGIM
v.
WYLLIE.

the balances remaining in his hands at different periods, but he had made no final settlement, and no division or distribution of the assets had been made or ordered. Such being the case, we think it is quite clear that the complainants could not, in this suit, require the defendants to account for the personal property so received. If the defendants were liable to account or pay for it, the administrator was the proper person to bring the suit. He, only, could sue for personal property belonging to the estate, and if he neglected to make a settlement in due time, or if he permitted such property to be wrongfully taken, and neglected to take the necessary steps for its recovery, other parties interested would have appropriate remedies as against him.

As to the real estate, it appears that the female defendant continued to occupy the farm of her first husband until her marriage with *Fillingim*, in 1844. During this period, the children, including the complainants, were supported and educated by her as their natural guardian. The value of the annual rental, at the highest estimate placed upon it, after deducting the one-third to which she was entitled as her dower, could not have exceeded about 75 dollars, and this must be considered a very moderate allowance indeed for the expenses of the children. It does not appear that any compensation was made, for the support of the complainants during that period, except the slight services which they rendered in the family, and we think they are not equitably entitled to claim any sum as due to them for the use and occupation of their portion of the land.

After their marriage, the defendants continued in the occupation of the farm about two years, but the complainants sued and obtained a judgment against them for the rent due for those years, which judgment the defendants satisfied.

We are of opinion, therefore, that no claim has been established by the complainants which entitles them to a decree against the defendants.

Per Curiam.—The decree is reversed with costs. Cause remanded, with instructions to the Circuit Court to dismiss the bill.

Nov. Term
1851.

BENNETT

v.

THE STATE.

A. P. Hovey, for the appellant.

J. Pitcher, for the appellees.

BENNETT v. THE STATE.

An indictment for murder in the first degree, was found in the *Decatur* Circuit Court at the *April* term, 1851, and concluded *contra formam statuti*. By the statute of 1843, the punishment of that crime was death. By the act of 1846, the punishment is either death or imprisonment in the state prison at hard labor during life, at the discretion of the jury. *Held*, that the conclusion of the indictment in the singular, to-wit, *contra formam statuti*, was correct.

At the term of said Court in which the indictment was found, the defendant moved the Court for a change of venue. The Court granted the motion, and entered, on the Court docket, an order for the change of venue to the *Ripley* Circuit Court; but the clerk neglected to enter the order on the order-book. A transcript of the proceedings in the cause in the *Decatur* Circuit Court, except said order on the Court-docket, was made out by the clerk of that Court and duly certified by him under the seal of the Court. That transcript, with the indictment and other papers in the cause, was, on the 22d of *July*, 1851, delivered to the clerk of the *Ripley* Circuit Court, who, on the day last named, filed the same in his office. After the motion for the change of venue was made, several witnesses were recognized in the *Decatur* Circuit Court to give evidence, in the *Ripley* Circuit Court, in the cause, and their recognizances were recorded on the 22d of *July*, 1851, in the *Ripley* Circuit Court. On the 23d of *September*, 1851, the clerk of the *Decatur* Circuit Court filed in the clerk's office of the *Ripley* Circuit Court, as one of the papers in the cause, a certified statement of the order for a change of venue, as entered as aforesaid on the Court-docket of the *Decatur* Circuit Court. Afterwards, on the day last named, the parties appeared in the *Ripley* Circuit Court, and the Court, on the defendant's motion, continued the cause until the 29th of *September*, 1851. The defendant then objected to the jurisdiction of the *Ripley* Circuit Court, on the ground that there had been no order, by the *Decatur* Circuit Court, for a change of venue. *Held*, that the objection was correctly overruled.

The affidavits of individual jurors are not, on grounds of public policy, admissible to impeach their own verdict.

ERROR to the *Ripley* Circuit Court.

Wednesday,
December 3.

Nov. Term,
1851.

BENNETT
v.
THE STATE.

BLACKFORD, J.—This was an indictment for murder in the first degree. The indictment was found in the *Decatur* Circuit Court at the *April* term, 1851, and concludes *contra formam statuti*.

The defendant pleaded not guilty. The cause was tried in the *Ripley* Circuit Court. The jury found the defendant guilty as charged in the indictment, and that he suffer death. Motions for a new trial and in arrest of judgment overruled, and judgment on the verdict.

The first objection is that the indictment should have concluded *contra formam statutorum*. By the statute of 1843, the punishment of the crime charged in this indictment was death. R. S. 1843, p. 960. By the act of 1846, the punishment is either death or imprisonment in the state prison, at hard labor during life, at the discretion of the jury. Acts of 1846, p. 40. A case very similar to the present occurred in this Court as early as 1822. The indictment was for perjury. The punishment of the offense, at the time it was charged to have been committed, was whipping not to exceed 100 stripes. But before the finding of the indictment, the punishment had, by statute, been changed to confinement in the state prison. It was decided that the conclusion of the indictment in the singular, to-wit, *contra formam statuti*, was correct. *Strong v. The State*, 1 Blackf. 193. We are of opinion, upon the authority of that case, that the conclusion of this indictment is not objectionable.

The second objection is, that there was no order of the *Decatur* Circuit Court for a change of venue to the *Ripley* Circuit Court.

The facts on this subject, as shown by the record, are as follows:

At the term of the *Decatur* Circuit Court, in which the indictment was found, the defendant moved the Court for a change of venue. The Court granted the motion, and entered, on the Court-docket, an order for the change of venue to the *Ripley* Circuit Court; but the clerk neglected to enter the order on the order-book.

A transcript of the proceedings in said cause in the

Decatur Circuit Court, except said order on the Court-docket, was made out by the clerk of that Court and duly certified by him under the seal of the Court. That transcript, with said indictment and other papers in the cause, was, on the 22d of *July*, 1851, delivered to the clerk of the *Ripley* Circuit Court, who, on the day last named, filed the same in his office. After said motion for a change of venue was made, several witnesses were recognized in said *Decatur* Circuit Court to give evidence, in the *Ripley* Circuit Court, in said cause; and their recognizances were recorded, on the 22d of *July*, 1851, in the *Ripley* Circuit Court. On the 23d of *September*, 1851, the clerk of the *Decatur* Circuit Court filed in the clerk's office of the *Ripley* Circuit Court, as one of the papers in the cause, a certified statement of the order for a change of venue, as entered as aforesaid on the Court-docket of the *Decatur* Circuit Court. Afterwards, on said 23d of *September*, 1851, the parties appeared in the *Ripley* Circuit Court, and the Court, on the defendant's motion, continued the cause till the 29th of *September*, 1851.

The defendant then objected to the jurisdiction of the *Ripley* Circuit Court, on the ground that there had been no order, by the *Decatur* Circuit Court, for a change of venue. This objection was correctly overruled. The facts above stated show, that the order for the change of venue had been duly made by the *Decatur* Circuit Court, and that sufficient evidence of the existence of the order was, before said objection was made, placed on the files of the *Ripley* Circuit Court.

The third objection is, that the evidence does not support the verdict. We think the evidence very clearly shows that the objection is not tenable. The confession of the defendant of his guilt, made more than once, is expressly proved by one of the witnesses; and there is also a good deal of other evidence against him.

The last objection is, that the verdict, as regards the punishment, was arrived at by an improper mode, adopted for the purpose, by the jury. The alleged misconduct of the jurors, by balloting, under a certain agreement as

Nov. Term,
1851.

BENNETT
V.
THE STATE.

Nov. Term,
1851.

ASHBY
v.
WEST.

to the punishment to be inflicted, is the foundation of this objection.

There was no evidence as to this objection, except the affidavit of one of the jurors. Were the affidavit admissible, it would not support the objection; as it does not, in our opinion, contain sufficient matter to authorize the setting aside of the verdict. But it is not necessary to examine, particularly, the contents of the affidavit. It is well settled that the affidavits of individual jurors are not, on grounds of public policy, receivable to impeach their own verdict. *Vaise v. Delaval*, 1 Term R. 11.—*Dana v. Tucker*, 4 Johns. R. 487.—*Owen v. Warburton*, 1 N. R. 326.—*Harvey v. Hewitt*, 8 Dowl. P. C. 598.

Per Curiam.—The judgment is affirmed with costs.

J. S. Scobey, for the plaintiff.

A. Davison, for the state.

ASHBY v. WEST.

In replevin in the detainer, the general issue, under the R. S. 1843, puts in issue the property of the plaintiff.

It is no objection to the competency of a witness, in actions of replevin and trover, that he is called to prove the title of the property sued for to be in himself.

In replevin by *A.* against *B.* for a quantity of flour, *A.* first read in evidence a written contract entered into with him by *C.*, whereby *C.* agreed to manufacture, within a time limited, at his, *C.*'s, mills, for *A.*, 2000 barrels of superfine flour, *A.* to furnish the wheat, &c. He also proved that, soon after the execution of the contract, he delivered large quantities of wheat to *C.* pursuant thereto; that the flour in controversy was manufactured by *C.* out of said wheat, and shipped by him to *B.*'s warehouse; that *B.* gave *C.* warehouse receipts for the flour; and that *C.* transferred those receipts to one *D.* *A.* then offered to prove the declarations of *C.* that when he, *C.*, received said wheat, he said it was *A.*'s wheat; and when he shipped said flour to *B.*, he said it was *A.*'s flour. The evidence of these declarations was objected to, as being hearsay testimony, but the objection was overruled. *Held*, that the objection should have been sustained.

A. having proved the contract and facts mentioned and a demand of the

flour of *B.* as his property, and, also, an offer to pay *B.* his charges on the same and his refusal to deliver it; and the court having admitted proof of the declarations of *B.* as above mentioned; and *A.* having given in evidence said warehouse receipts and their assignment to *D.* to secure a loan; *A.* then offered to read the deposition of *B.*, which was in relation to facts directly concerning the property in the flour, but the Court rejected the deposition. *Held*, that the rejection was wrong. The contract between *A.* and *C.* was one of bailment and not of sale. Instructions given to the jury will be presumed to be correct, where the transcript does not profess to contain all the evidence.

Nov. Term,
1851.

ASHBY
v.
WEST.

ERROR to the *Dearborn* Circuit Court.

Wednesday,
December 3.

BLACKFORD, J.—This was an action of replevin, brought by *West* against *Ashby*, for 420 barrels of flour. The *gravamen* is, the unlawful detainer of the flour. The defendant pleaded the general issue, and also the following special pleas: 1. Property in himself; 2. Property in *Edmund Hale*; 3. Property in *William Bradley*. Replications in denial of the special pleas.

The plaintiff, *West*, previously to the trial, moved the Court to suppress the deposition of *Miles A. Bradley*; and the motion was sustained.

During the trial, the plaintiff offered to prove certain declarations which had been made by *William Bradley*. The evidence was objected to; but the objection was overruled.

The defendant, *Ashby*, during the trial, offered in evidence the deposition of *William Bradley*. This deposition was objected to by the plaintiff, and the objection was sustained.

The parties respectively asked of the Court various instructions to the jury. Those asked for by the plaintiff were given; and those asked for by the defendant were refused.

Verdict and judgment for the plaintiff.

The first proceeding in this cause which is objected to, is the suppression of the deposition of *Miles A. Bradley*, which deposition was offered by the defendant. The ground of the plaintiff's objection to the deposition is, that the witness was interested in favor of the defendant.

In determining this point, the Circuit Court had nothing

Nov. Term,
1851.

before it but the pleadings in the cause and the deposition itself.

ASHBY
v.
WEST.

The real question in issue was, whether or not the flour sued for was the property of the plaintiff? The general issue, under the statute, raised that question. R. S. 1843, p. 701.

The deposition we are examining states, that *William Bradley* deposited the flour as his own with *Ashby*, the defendant, and took the receipts of *Ashby*, a warehouse man, for the flour; that said *William Bradley* assigned those warehouse receipts to *Edmund Hale* as a security for a loan of money; and that, afterwards, said *William Bradley* assigned his remaining interest in the flour to the witness, *Miles A. Bradley*, as a security for a debt due from the assignor to the witness and another person.

The plaintiff contends that the witness had an interest in the flour sued for, and was therefore interested in defeating the suit. But it is no objection to the competency of a witness, in actions of replevin or trover, that he is called to prove the title of the property sued for to be in himself; as it makes no difference to the witness, in a legal point of view, which of the parties succeeds. The verdict and judgment in such cause would not be evidence in a subsequent action brought by the witness for the property; he not being a party or privy to the suit. *Ward v. Wilkinson*, 4 Barn. and Ald. 410.

The next question is whether the declarations of *William Bradley*, which the plaintiff was allowed to prove, were admissible evidence?

The plaintiff first read in evidence the following written contract entered into with him by *William Bradley*:

"I have this day contracted with *C. W. West & Co.*, to manufacture for them, at my mills in *Brookville, Ind.*, in all of the months of *August* and *September* next, 2000 barrels of superfine flour, *Cincinnati* inspection guaranteed, on terms as follows—they to furnish the wheat in barrels at *Metamora, Laurel, Null's* mills, and *Cambridge City*, viz., five bushels of wheat and the barrel, for a barrel of flour. The flour to be delivered on

board of boats at *Brookville*, at one cent per barrel expense of storage and drayage. The wheat to be taken at 60 pounds to the bushel. About 2500 bushels of said wheat are at *Metamora*; about 300 bushels at *Laurel*; about 200 bushels at *Null's* mills; and the balance at *Cambridge*. The surplus barrels and the wheat over the 2000, I will buy, if we can agree on the price, if not, will hold them subject to your order. *Cincinnati, July 28th, 1847.* (Signed) *Wm. Bradley.*"

Nov. Term,
1851.

ASHBY
v.
WEST.

The plaintiff also proved that soon after the execution of said contract, he delivered large quantities of wheat to said *William Bradley* under the contract; that the flour in controversy was manufactured by said *Bradley* out of said wheat, and was shipped by him to the defendant's warehouse; that the defendant gave said *Bradley* warehouse receipts for the flour; and that, he, *Bradley*, transferred those receipts to a third person.

The plaintiff then offered to prove the declarations of said *William Bradley*, hereinbefore mentioned, namely, that when he, *Bradley*, received said wheat, he said it was *West's* wheat; and when he shipped said flour, he said it was *West's* flour. The evidence of these declarations was objected to by the defendant as being hearsay evidence. It is a general rule that declarations, made by a third person not under oath, are not admissible in evidence. There are some exceptions to this rule, but they do not embrace the evidence in question. The issue in this case was, whether or not the flour sued for was the plaintiff's property? and the burthen of proof was on the plaintiff. The defendant held the flour for the person to whom the warehouse receipts had been assigned; and we think the plaintiff's case was to be proved independently of the assignor's declarations as to the property. The assignor himself, for anything that appears, could have been examined as a witness for the plaintiff.

Another question in the cause is, as to the admissibility in evidence of the deposition of *William Bradley*.

Before this deposition was offered in evidence, the plaintiff had proved said written contract between himself

Nov. Term,
1851.

ASHBY
v.
WEST.

and *William Bradley*; *Bradley's* receipt of the wheat under the contract, and his manufacturing of it into flour; his shipment of the flour from *Brookville* to *Harrison*, and depositing the same with the defendant as a warehouse man. The plaintiff had also proved a demand of the flour, as his property, of the defendant—offering to pay the latter's charges on the flour—the defendant's refusal to deliver the flour, and the aforesaid declarations of *Bradley*. The defendant had given in evidence the before-mentioned warehouse receipts; their assignment by *William Bradley* to *Edmund Hale* to secure a loan; and said *Bradley's* sale of his remaining interest in the flour to *Miles A. Bradley*.

At that stage of the cause, the defendant offered to read the said deposition of *William Bradley*. That deposition was a very important one for the defendant; because *William Bradley* there states, *inter alia*, that the greater part of the flour now sued for was in his mill, before he received any of the plaintiff's wheat under said written contract.

The plaintiff objected to this deposition, on the ground that the witness was interested in favor of the defendant.

The objection would be clearly unfounded, if the witness had not disposed of the flour; because, in that case, his legal rights would not have been affected by the success of either of the parties. Suppose the verdict and judgment in this suit should be in favor of *Ashby*; and the witness (supposing him still the holder of the warehouse receipts) should afterwards sue *Ashby* for the flour; that verdict and judgment would not be admissible in evidence for the witness. Again, suppose the verdict and judgment in this suit should be for *West*, and the witness (not having parted with said receipts) should afterwards sue *West* for the flour; *West* could not give said verdict and judgment in evidence against the witness. In neither of those cases, would the witness be a party or privy to the verdict and judgment.

That this deposition of *William Bradley*, were he still the holder of said receipts, would be evidence for the de-

fendant, appears by the following case: Trover by *Hearne* against *Turner* for two promissory notes. The defendant pleaded that before *Hearne* was possessed of the notes, one *Mytton* was lawfully possessed of them as of his own property; that the notes had been wrongfully delivered to *Hearne*; whereupon the defendant as the agent of *Mytton*, and by his direction and authority, took the notes out of the possession of *Hearne*. The replication traversed the property in *Mytton*. To prove that *Mytton* was the owner of the notes, *Mytton* himself was called as a witness. He stated, on the *voir dire*, that he had not indemnified the defendant, and that he had nothing to do with the action. The Court held that *Mytton*, at common law, was a competent witness for the defendant. *Hearne v. Turner*, 2 Mann., Granger, and Scott, 535.

Nov. Term,
1851.

ASHBY
v.
WEST.

We must next consider whether *William Bradley's* assignment of the warehouse receipts makes any difference. If *Hale*, the assignee, had taken possession of the flour, and this action had been against him, it may be that *Bradley*, the assignor, would not have been a competent witness. But here *Ashby*, not *Hale*, is the defendant, and should *Ashby* lose this suit, and *Bradley* be afterwards sued, on his warranty of title, by *Hale*, the verdict and judgment against *Ashby* would not be evidence for *Hale*, the latter not being a party or privy to the first suit.

We are therefore of opinion that the deposition of *William Bradley* ought not to have been rejected.

The first instruction asked for by the defendant and refused, was, that the written contract between the plaintiff and *William Bradley* (which is hereinbefore copied) is a contract of sale. We are clearly of opinion that that contract is one of bailment, and not of sale. The refusal of the other instructions asked for by the defendant, must be presumed to be correct, as the transcript does not profess to contain all the evidence. *The State v. Beackmo*, 8 Blackf. 246.

The first instruction to the jury, given at the plaintiff's request, was, that said written contract was one of bailment. That is unobjectionable. The others were as

Nov. Term,
1851.

PATE
v.
THE STATE
BANK OF
INDIANA.

follows: Secondly, That if the jury believe from the evidence that the flour in question was manufactured from the identical wheat received under the contract with *West*, they must find for the plaintiff; Thirdly, That if the jury believe that a small portion of the flour in question was manufactured out of wheat bought and exchanged for by *Bradley*, and the balance out of the identical wheat delivered to him by *West*, and such admixture of the wheat was without the consent of *West*, the flour in question is the property of the plaintiff, and the jury must find for him. These two last-mentioned instructions are relevant to the issue, and must be presumed (all the evidence not being given,) to be correct.

The judgment must be reversed. The depositions of *Miles A.* and *William Bradley* ought to have been admitted in evidence; and the evidence of the declarations of *William Bradley* should have been rejected.

Per Curiam.—The judgment is reversed, and the proceedings subsequent to the suppression of the deposition of *Miles A. Bradley* inclusive, are set aside, with costs. Cause remanded, &c.

P. L. Spooner and *J. Ryman*, for the plaintiff.

D. S. Major and *A. Brower*, for the defendant.

PATE v. THE STATE BANK OF INDIANA.

The *State Bank*, through her branch at *Lawrenceburgh*, purchased a bill of exchange drawn at *Lawrenceburgh*, payable at the *Lafayette* bank of *Cincinnati*. The bill was sent by said branch to said *Lafayette* bank, for collection, and it was protested on the 11th day of *August*, 1849, when it became due, for non-payment. On *Sunday* the 12th or *Monday* the 13th of that month, the cashier of said branch, received from the notary, through the post-office, a letter containing notices of the protest, addressed to the drawer and indorsers severally. On the same day, the teller of said branch mailed the notice to the indorser, *Pate*, in a letter directed to him at his residence. There was no evidence that the branch had endorsed the bill to the *Lafayette* bank. Held, that the course pursued by the notary in inclosing the notices to the several parties to said branch, was in accordance with a practice sanctioned by the

Supreme Court of *Ohio*, and was sufficient. *Held*, also, that the notice was mailed by the notary in due time.

Nov. Term,
1851.

ERROR to the *Dearborn* Circuit Court.

SMITH, J.—Assumpsit by the *State Bank of Indiana* against *Pate*, on a bill of exchange. The bill was drawn by *J. F. Cheek*, at *Lawrenceburgh*, in this state, on *E. C. Cheek*, at *Cincinnati, Ohio*, payable to the order of *L. Cheek*, at the *Lafayette* bank in *Cincinnati*, ninety days after date. *L. Cheek* indorsed the bill to the defendant, *Pate*, who indorsed to the plaintiff, the bill having been purchased by the branch of the state bank of *Indiana* at *Lawrenceburgh*. Plea, the general issue. Verdict and judgment for the plaintiff.

PATE
v.
THE STATE
BANK OF
INDIANA.

Thursday,
December 4.

The bill became due on the 11th of *August*, 1849, and was, on that day, presented at the *Lafayette* bank in *Cincinnati*, at the request of the cashier of that bank, for payment, and was protested for non-payment.

The notary public certified, in his instrument of protest, that he had protested the said bill for non-payment, and notified the drawer and indorsers to that effect.

There was no evidence of the manner in which such notice was given to the defendant, except the following:

On *Sunday* the 12th or *Monday* the 13th of *August*, the cashier of the branch of the state bank at *Lawrenceburgh*, received from the notary, through the post-office, a letter containing notices of the protest, addressed severally to the drawer and indorsers. On the same day, the teller of the branch at *Lawrenceburgh* mailed the notice to *Pate* in a letter directed to him at *Rising Sun*, and, also, on the same day, mailed a copy of said notice directed to him at *Aurora*. Before mailing said notices, the said teller made inquiries of several persons likely to know the residence of the said *Pate*, and was informed that he lived at *Rising Sun*, but was then temporarily at *Aurora*.

The only point made by the plaintiff in error is, that this evidence does not show that he had sufficient notice of the protest. He contends that notice should have been given him by the notary, and that, at least, there should

Nov. Term,
1851.

PATR
v.
THE STATE
BANK OF
INDIANA.

have been evidence that the notice was deposited in the post-office at *Cincinnati* in time to go by the next mail.

We think the evidence that the notices were received through the post-office at *Lawrenceburgh*, on *Sunday* the 12th of *August*, the next day after the bill was protested, or on the *Monday* following, is sufficient evidence that they were mailed at *Cincinnati* in due time.

The course taken by the notary in inclosing notices to the several parties to the branch of the state bank at *Lawrenceburgh*, is in accordance with a practice sanctioned by the Supreme Court of *Ohio*. That practice is, where there are several parties, to make out a notice for each one, and inclose all to the last indorser, he being the only one whose residence is supposed to be known to the holder; and if that indorser notifies those who stand before him on the paper, they all become liable. *The Ohio Life Insurance and Trust Co. v. McCague*, 18 Ohio R. 54.

In this case, it is true, there is no evidence that the state bank indorsed the bill, but it was sent by that institution to the *Lafayette* bank for collection, and it is scarcely to be supposed the residence of the indorsers would be known at the latter bank. We can see no impropriety, therefore, in the notices being sent to the state bank, the last holder of the paper known to the bank at *Cincinnati*, and where the residence of all the parties would be best known. The law requires only reasonable diligence and reasonable efforts, made in good faith, to notify the parties to a bill or note of its being protested, and we think it is sufficiently shown that such diligence was used in this case.

Per Curiam.—The judgment is affirmed with 5 per cent. damages and costs.

A. Brower, for the plaintiff.

P. L. Spooner, for the defendant.

SOFIELD v. THE WHITE WATER VALLEY CANAL COMPANY.

Nov. Term,
1851.

SOFIELD

v.

WHITE WATER
VALLEY CA-
NAL COMPANY.

Application by the widow of one S., an intestate, against the *White Water Valley Canal Company*, for the assessment of damages occasioned by the construction of their canal through a lot claimed by her. It was proved, on the hearing, that the intestate, at his decease, was the owner of the property; that he was born and raised in *New Jersey*; that he and the plaintiff were married, and lived on the property sixteen years, until 1838, when he died, leaving her in possession of the premises, where she remained until the trial in 1845; and that the intestate had no children, as far as was known. A witness also testified that he had known, and lived in the same town with, the intestate, for the last sixteen years before his death, and knew of no relatives or heirs of the intestate, except the plaintiff. *Held*, that the evidence showed, *prima facie*, that the plaintiff was the sole heir of the intestate, under the R. S. 1843.

ERROR to the *Fayette* Circuit Court.Thursday,
December 4.

PERKINS, J.—The *White Water Valley Canal Company* constructed their canal across a lot in the town of *Connersville*, *Fayette* county, *Indiana*, of which *Phebe Sofield* claimed to be the owner; and this suit is a claim by her against said company for damages occasioned by said construction of the canal. The defendant pleaded not guilty, and that more than two years elapsed between the appropriation of the lot by the company and the preferring of this claim for damages.

The cause, in the usual course of proceedings, reached the Circuit Court, by appeal. It was there submitted to the Court, without a jury, upon the following evidence:

1. A deed to the lot in question, dated the 19th of *February*, 1821, from *Abiathar Hathaway*, of *Fayette* county, *Indiana*, to *Lewis Sofield* of the same place, accompanied by proof that said *Lewis* took possession; that he was married to said *Phebe Sofield*; that they together lived upon the lot about sixteen years, being till 1838, when said *Lewis* died, intestate and childless, so far as was known, leaving said *Phebe*, his widow, in possession of said premises, where she remained till the time of the trial of this cause, being the fall of 1845.

2. Proof that the damages to the lot by the construction of the canal were 100 dollars.

Nov. Term,
1851.

SAMPLE
v.
LAMB.

3. That previous to his purchase of said lot, said *Lewis Sefield* lived in *New Jersey*, where he was born and raised; "and there being no proof either for or against said plaintiff that said *Lewis* had any kindred or relations of any kind living, at the time of his death, except the testimony of one witness, who stated that he had known said *Lewis* for the last sixteen years, and had lived in the same town with him for that length of time, and knew of no relations or heirs (the plaintiff, his widow, excepted,) of said *Lewis*, nor had he ever heard of any; thereupon the Court decided that said plaintiff, *Phoebe*, was only entitled to recover one-third of the damages proved, &c., and gave her a judgment for 33 dollars and 33 cents."

The evidence in this case is rather meager. It does not inform us of the age of *Lewis Sefield* at his death, nor whether he had had a former wife; but, taken in connection with the great length of time said *Sefield* and his widow had resided in *Fayette* county, where this cause was tried, we think it, *prima facie*, rebuts the presumption that said *Lewis* left any heirs other than his widow; and that the Court, consequently, erred in their decision—our statute giving her, in such case, the whole of her husband's estate. There is no evidence as to the time when the lot was appropriated by the company.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

C. H. Test, for the plaintiff.

J. S. Newman, for the defendant.

SAMPLE v. LAMB.

In a suit upon a promissory note by the assignee against the maker, the latter may plead, under the R. S. 1843, by way of set-off, an individual account which he had against any assignor prior to notice of the assignment.

Where the account against the assignor is larger than the amount of the note, the plaintiff cannot, by releasing the assignor from liability upon the assignment, render him a competent witness.

APPEAL from the *St. Joseph* Circuit Court.

Nov. Term,
1851.

PERKINS, J.—*Andrew R. Sample* brought an action, before a justice of the peace, against *George W. Lamb*, on a promissory note for 92 dollars and 71 cents, given by *Lamb* to *Gilmore* and *Kaufman*, and by them assigned to said *Sample*. The cause went by appeal into the Circuit Court. The defendant pleaded as follows: That the plaintiff ought not to maintain his suit, because the said promissory note, on the 6th of *November*, 1849, was duly assigned by the plaintiff, *Sample*, to *Jacob Kaufman*, who continued to be the assignee and owner of said note until the 27th day of said month; and that said *Kaufman*, during the time he was so assignee of said note, was indebted to the said defendant, and still is, on an open account for work and labor, &c., in the sum of 300 dollars; that on the 17th of said *November*, said *Kaufman* sued this defendant, *Lamb*, before, &c., on said note, and said *Lamb*, in that suit, pleaded this said account as a set-off, whereupon said *Kaufman* dismissed his said suit, and said *Sample* afterwards took back said note, striking out his assignment to said *Kaufman*; and said defendant now offers said account again as a set-off in this suit.

SAMPLE
v.
LAMB.

Thursday,
December 4.

Accompanying the plea was a bill of particulars amounting to 236 dollars and 14 cents. To this plea, *Sample*, the plaintiff, replied, that *Kaufman* did not owe said *Lamb* the account in his plea mentioned; that the same had been settled by and with an account of said *Kaufman* against said *Lamb*, &c., and he filed an account of *Kaufman* against *Lamb*, amounting to some 50 dollars.

On the trial, after *Lamb*, the defendant, had proved his account as a set-off, *Sample*, the plaintiff, having released said *Jacob Kaufman* from liability to him on said note as a joint assignor of the same with *Gilmore*, offered to prove by said *Kaufman* that the account against him proposed to be set off in this suit by said *Lamb*, had been settled and paid; but the Court refused to permit the witness to testify to such fact. This is the error complained of. In our statute, making bills and notes assignable, is this provision:

Nov. Term,
1851.

SAMPLE
v.
LAMB.

"Such maker, drawer, or obligor may set up and show any just matter of payment, set-off, or other defense in his favor, as against the plaintiff in such action; and also all just matters of payment, set-off, or other defense which he had, as against any assignor, before notice of the assignment thereof by such assignor, and which he might have set up and shown, had an action been brought against him on such note, bill, bond, or other instrument by such assignor." R. S. p. 577, s. 9.

According to this section, *Jacob Kaufman* having been the owner, by assignment, of the note in suit, and *Lamb*, the maker thereof, having had, while said *Kaufman* was so owner, an account against him which might have been set off, had he sued, it could also be set off as against any other person, subsequently procuring the note from said *Kaufman*. *Sample* did subsequently procure it, and the account could be set off as against him. This account, then, being a legal set-off in this case, and being put in and relied on as such, should the plaintiff below obtain judgment for any amount on the note and account filed by him, the judgment would involve a determination upon the validity of the account against *Kaufman*, and bar any other suit upon it; and as said latter account is larger than the amount of the note and account filed by the plaintiff together, it is very easy to see that *Kaufman* was interested in swearing it off and having the plaintiff obtain judgment; thus relieving himself from liability to *Lamb* on any part of said account against him.

Kaufman had, therefore, a legal interest in the event of the suit, and was properly excluded from being a witness to the matter as to which he was offered.

Per Curiam.—The judgment is affirmed with costs.

J. L. Jernegan, for the appellant.

HOBBS and Others v. THE BOARD OF COMMISSIONERS OF LA-
GRANGE COUNTY.

Nov. Term,
1851.

HOBBS

v.
THE BOARD OF
COMMISSION-
ERS OF LA-
GRANGE
COUNTY.

A bond was executed in *July*, 1840, in pursuance of an act of the legislature, to the county of *Lagrange*, for the conveyance of twenty acres of land, to be laid off into out-lots, on the west side of the plat of the village of *Lagrange*, in consideration of the location of the county-seat in that village. In 1841, the obligors executed a deed, in alleged conformity with the bond, of twenty acres of land, particularly described therein, to *A. and B.*, commissioners appointed to superintend the erection of public buildings in that county. In 1845, the commissioners of the county filed a bill in chancery for the correction of the deed as to the parties, and the deed was so corrected as to convey the land to the county agent for the use of the county. A bill was afterwards filed by the board of commissioners and the county agent, to correct an alleged mistake in the description of the premises; but it was not pretended therein that there was any concealment, misrepresentation, fraud, or misunderstanding at the time the deed was made as to its contents. *Held*, that, under the circumstances, the latter bill would not lie.

ERROR to the *Lagrange* Circuit Court.

Thursday,
December 4.

PERKINS, J.—Bill in chancery by the commissioners and agent of *Lagrange* county against *Joshua T. Hobbs* and others for a specific performance. Decree for the plaintiffs below.

The following facts are gathered from the bill, answers, replications, and exhibits :

On the 8th day of *July*, 1840, the obligors thereto executed the following bond :

“Know all men by these presents, that we, *Joshua T. Hobbs*, *William McConnell*, and *Reuben J. Dawson*, are held and firmly bound unto *Philo Taylor* and *Palmer Grannis*, county commissioners of the county of *Lagrange*, in the sum of 8,000 dollars,” &c.

“The condition of the above bond is such that, whereas *John Jackson*, *Marshall S. Wines*, *Thomas Lewis*, and *Joel Bristol*, were appointed commissioners by the legislature of *Indiana*, at the last session thereof, to re-locate the seat of justice of *Lagrange* county, *Indiana*, and in making said re-location were authorized and required to take into consideration donations,” &c.; “and whereas, in consideration of the following donation made to said county

Nov. Term,
1851.

HOBBS
v.
THE BOARD OF
COMMISSION-
ERS OF LA-
GRANGE
COUNTY.

by said *Hobbs*, *McConnell*, and *Dawson*, said commissioners have re-located the seat of justice of said county in the village of *Lagrange*," &c.; "now, if the said *Hobbs*, *McConnell*, and *Dawson* shall, within one year from the date hereof, convey to said county," &c., "the equal undivided one-third part of said village plat," &c., "and shall also donate for the use of said county 20 acres of land to be laid off in out-lots on the west side of said village plat, then," &c.

On the 20th day of *February*, 1841, said obligors executed to *Aaron Thompson* and *John Y. Clark*, commissioners duly appointed to superintend the erection of public buildings in said county, &c., a deed for the various pieces of property specified in said bond, including, "also, all that tract or parcel of land situated in said county, containing twenty acres, bounded on the south by a line drawn due west from south-west corner of the plat of the town of *Lagrange* aforesaid, (as now laid off and recorded,) to the line dividing ranges nine and ten east; thence by a line drawn north along the range line aforesaid, and by a line drawn from the place of beginning, north along the western boundary of said town plat, until a due east line will contain the aforesaid quantity of twenty acres," &c. This deed was made, by mistake, to said *Thompson* and *Clark*, instead of the county agent; and, in 1845, the commissioners of *Lagrange* county prosecuted a bill for the correction of the deed as to parties, in which proceeding, in 1846, they obtained the desired decree.

The following deposition of *John Spencer* was read upon the hearing of the cause:

"I was present when the above defendants executed the bond for the conveyance of town-lots and land as a donation to *Lagrange* county, in consideration of the relocation of the county seat, and the land shown to the commissioners by the defendants was the south end of a fractional tract lying on the west side of the town of *Lagrange*, and between that and the range line dividing ranges nine and ten; and it was well understood between said defendants and the locating commissioners, that the

20 acre tract for out-lots was intended to be located as above, running north from the south end of said tract for quantity. There was no proposition made or spoken of by either party about locating the 20 acre tract along the whole west line of the plat of the town of *Lagrange*, nor was the land along the north-west side of said town-plat examined or seen by the locating commissioners to my recollection or knowledge."

Nov. Term,
1851.

HOBBS
v.
THE BOARD OF
COMMISSION-
ERS OF LA-
GRANGE
COUNTY.

In discussing this case, the counsel for the plaintiffs in error, (the county commissioners and agent,) take this position:

"In grants and patents, where a base-line is given on which an area of a certain number of acres is to be laid out, the *whole* line must be taken as the base, and you must depart from its extremities by right angles for quantity. It is absolutely necessary to adopt this rule, *ut res magis valeat quam pereat*; for otherwise the grant or condition is absolutely void. You cannot resort, in a case like this, to parol evidence, because there is no ambiguity, latent or otherwise."

The case shows that the land deeded to the county by the above obligors, in an attempt to fulfill the condition of their bond, was not upon a base-line extending the whole length of the west side of the town-plat, but only about half the length of that side.

It is contended, therefore, that the condition of the bond has not been complied with; and this suit is to compel a conveyance of 20 acres, based upon a line extending the whole length of the west side of the town-plat.

The 20 acres deeded have not been reconveyed, nor is there any offer to reconvey.

Whether the rule of construction above laid down to be applied to grants of this character is without exception, and whether parol evidence may, in any case, be permitted to explain such grants, are not questions properly arising in this case. If, however, the rule is inflexible, and parol evidence cannot be given, we can easily imagine cases where great injustice would result. Take a case like the present, where land is donated "to be laid

Nov. Term,
1851.

HOBBS
v.
THE BOARD OF
COMMISSION-
ERS OF LA-
GRANGE
COUNTY.

off in out-lots on the west side of said village," &c., that is, land suitable to be laid off in out-lots, &c. Now, suppose the village lies upon the bend of a broad navigable river, or at the base of an abrupt mountain of rock, which forms the boundary of half the length of said side; or, again, suppose the giver of the donation does not own the land upon the whole length of the side on which the donation lies, and that this fact is well known to all parties at the time the donation is made; in these cases, if parol evidence of the circumstances could not be given, and the base-line must extend the whole length of the town, it is plain, injustice might happen. But as to this, we decide nothing; the point not being, as we have said, in the case. It is too late to look into it in this suit; for we think the county estopped by her acceptance of the conveyance already made by the obligors to said bond. A deed was executed in 1841. That deed embraced the requisite quantity of land, and gave a plain description of its location. The county, by her proper officers, received it, and must have well understood its contents, as she procured a correction to be made in it so that it conveyed the land to the county agent for her use. There is no pretense of misrepresentation, concealment, or fraud, or misunderstanding, of any kind, about the contents of the deed, and there was an acquiescence of some years in it. All this shows, sufficiently, an acceptance by the county of the performance voluntarily made by the obligors of the condition of the bond; and, we think, under the circumstances of the case, the county cannot now go behind that acceptance.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

R. Brackenridge, Jr., for the plaintiffs.

J. B. Howe, for the defendants.

DECKER v. SHAFFER.

Nov. Term,
1851.DECKER
v.
SHAFFER.

Where *A.* owes *B.* and *B.* owes *C.*, in order to render *A.* liable to *C.* for *B.*'s debt, without a promise in writing, a mutual agreement of the parties must be proved that *B.* was to be released and *A.* was to pay *B.*'s debt to *C.*

ERROR to the *Whitley* Circuit Court.Thursday,
December 4.

PERKINS, J.—Assumpsit by *Shaffer* against *Decker*, administrator of *Shookman*, on an account of 50 dollars. The action was commenced before a justice of the peace, and was to recover a debt claimed to have been due from *Shookman*, in his lifetime. The cause went by appeal to the Circuit Court. Judgment was there given, on a trial by the Court in place of a jury, for the plaintiff. The evidence is upon the record, and is, in substance, as follows:

Samuel Hurd testified: *Shaffer* sold a mare to *Cuppy* and got his note. Shortly after, *Shookman* bought the same mare of *Cuppy* and promised him to pay his note to *Shaffer*. He and *Cuppy* came to the shop, and *Cuppy* delivered the mare to *Shookman*, and they spoke of the note *Shaffer* held on *Cuppy*, and *Shookman* then agreed to pay it. The promise was not in writing. Afterwards *Shookman* refused to do anything about it. *Cuppy* was insolvent.

James S. Cullins testified: He went to see *Shookman* in his lifetime. *Shookman* said he got the mare of *Cuppy* but would not pay him. He did not owe him. He intended to pay *Shaffer*.

The note given by *Cuppy* to *Shaffer* for the mare was in evidence; and on the foregoing proof the Court rendered judgment for *Shaffer*, for the amount of said note and interest.

The judgment cannot be upheld. The plaintiff below did not make out his case. He proved no indebtedness from *Shookman* to him. *Shookman* owed *Cuppy*, and *Cuppy* owed the plaintiff; and had there been proof that said plaintiff, *Cuppy*, and *Shookman*, met together and mutually agreed that said *Cuppy* was released from his

Nov. Term,
1851.

FOWLER
v.
SWIFT.

note to the plaintiff, and that said *Shookman* was, in consideration thereof, the debtor to that amount of said plaintiff, the judgment below would be right. 1 Chit. Pl. 16. Perhaps, the mutual agreement mentioned might have been consummated without a meeting of the three together; but such an agreement it was necessary to prove in this case. Such an agreement cannot be inferred from the evidence.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. D. Pratt, for the plaintiff.

FOWLER *v.* SWIFT.

In a suit upon a note given for the transfer of an interest in a patent, the questions whether a fraud was practiced or a warranty made at the time of the transfer, and, if either was done, what was the value of the right transferred, are for the decision of the jury; and their verdict will not be set aside where it is not clearly shown to be unauthorized by the evidence.

Thursday,
December 4.

APPEAL from the *St. Joseph* Circuit Court.

PERKINS, J.—Debt upon a promissory note by *Jason Swift*, the payee, against *Fowler* and *Garrison*, the makers. There was a return of not found, and a suggestion accordingly, as to *Garrison*. The general issue was pleaded by *Fowler*. The cause was tried by a jury and the plaintiff had a verdict and judgment. The Court refused a new trial. The cause is here upon the evidence.

The plaintiff introduced his note as follows, and rested:

"\$125.00. One year from date, for value received, we promise to pay *Jason Swift*, or bearer, one hundred and twenty-five dollars, waiving all appraisement and stay laws; dated *South Bend, July 16, 1849. John Fowler, Lewis Garrison.*"

The defendant proved that the note was given for a part of the consideration of the transfer, on the 23d of

October, 1849, to said *Fowler* and *Garrison*, by said *Swift*, of the exclusive right to make, use, and sell, in *Laporte* county, *Indiana*, *Harkness's* patent grain-rake; and sought to establish a want or failure of consideration, and fraud, in the sale.

Nov. Term,
1851.

FOWLER
v.
SWIFT.

It was proved that on the 16th of *July*, 1849, *Swift* sold to one *Rose* the right to sell twenty of said rakes in *Laporte* county. *Rose* testified that the year previous he purchased one of the rakes and used it. It worked well; was easily worked by a boy sixteen years old; one hand with the rake could keep up with a cradler. The next year it did not do as well, straw was so short; it would not do clean work where straw was short; the rakes are made at a cost of one dollar apiece and sold at three dollars apiece.

Welch had made three rakes, under the patent, for defendant; had seen them operate; when the grain was of the right length they worked well; had peddled the rakes, sold eleven, and did not make much over expenses; in short straw they were unprofitable, but in a common season they would do pretty well; all who purchased, whose wheat was the ordinary height, were well satisfied with the rake.

Murphy was present when plaintiff sold the right to *Fowler* and *Garrison*. Plaintiff told them that these rakes would save one-third of the labor, and work a great deal faster than the common rake; that a boy, from twelve to fourteen years old, could, with one of them, keep up with a cradler; had seen one of these rakes that worked well, and others that did not—would not, if straw was too short or too long.

Tutt says the rake will do well on smooth ground, not on rough. His farm is rough; hands preferred the common rake, and did cleaner work with it; one good hand with the common rake will keep up with a cradler.

Norton had tried to sell the rakes, but nobody would buy.

Shank had seen these rakes operate. They wasted more grain than the common rake.

Nov. Term,
1851.

ROBERTSON
v.
THOMPSON.

The rakes are made to work on wheels two and a half feet in diameter, with axletrees five feet long.

On this evidence, after argument of counsel, and under instructions from the Court, not objected to and not upon the record, the jury found a verdict for the plaintiff of 95 dollars debt, and 1 dollar and 20 cents damages; and the Court below refused a new trial and gave judgment accordingly.

The questions, whether there was fraud, or a warranty, in the sale of the right in question, and, if either, what was the value of the right sold, were for the jury on the trial; and, we think, upon the evidence, we cannot say that the Court below erred in refusing to set aside their verdict. See *Hardesty v. Smith*, at the present term of this Court (1), and *Kernodle v. Hunt*, 4 Blackf. 57 (2).

Per Curiam.—The judgment is affirmed with 2 per cent. damages and costs.

J. A. Liston, for the appellant.

J. L. Jernegan, for the appellee.

(1) *Ante*, p. 39.

(2) The term "useful," as applied in the patent act, is used merely in contradistinction to what is frivolous or mischievous to society; and it is satisfied if the alleged invention is *capable of use* and is not injurious to the well-being, good policy, or sound morals of society. *Lowell v. Lewis*, 1 Mason, 186.—*Bedford v. Hunt*, Id. 303.—*Kneass v. Schuylkill Bank*, 4 Wash. 9, 12.

• ROBERTSON v. THOMPSON.

A. residing in Jackson county, and B. in Clark county, were sued in assumpsit in the Jackson Circuit Court. Each was served with process in the county where he resided. The plaintiff, afterward, by leave of the Court, amended his writ and declaration by striking out the name of A. B. was then called and defaulted, and a jury was impaneled, which assessed the damages against him. The assessment was set aside, and, on the plaintiff's motion, another jury was called and a new assessment made, and judgment was rendered thereon. *Held*, that the leave to

amend was properly granted. *Held*, also, that *A.* and *B.*, when served with process, were brought within the jurisdiction of the Court, and that the dismissal of the suit as to *A.* did not divest the jurisdiction over *B.*, the record not disclosing that *A.* could not have been legally included in the judgment. *Held*, also, that the setting aside of the first assessment of damages and the awarding of another *venire* must be presumed, the record not showing the contrary, to be right.

Nov. Term,
1851.

ROBERTSON
v.
THOMPSON.

ERROR to the *Jackson* Circuit Court.

Thursday,
December 4.

PERKINS, J.—*John C. Thompson* brought an action of assumpsit in the *Jackson* Circuit Court, at the *February* term, 1844, against *Robert W. Moore* and *Harvey Robertson*. Process was served on *Moore* in *Jackson* county, and upon *Robertson* in *Clark* county. The defendants appeared by attorney, and pleaded the general issue. The cause was continued from term to term, and the declaration amended. At the *August* term, 1846, the defendant, *Moore*, demurred to a part, and pleaded *non assumpsit* to a part, of the amended declaration. Afterwards, at the same term, the attorney of *Robertson* withdrew the appearance for him, and thereupon he was called and defaulted. After this was done, the plaintiff obtained leave of the Court and amended his proceedings, by striking from the writ and declaration the name of the defendant, *Moore*. A jury was then called, who assessed the damages against *Robertson*. The assessment was set aside, on motion of the plaintiff; another jury was called; and a new assessment made, upon which the Court rendered judgment. The evidence is not upon the record, nor are the instructions. The case is not briefed. The following is the assignment of errors:

“*Harvey Robertson v. John C. Thompson*. The plaintiff, by his attorney, comes and says, in the foregoing record, proceedings, and final judgment, there is manifest error, in this, that final judgment was rendered against the plaintiff in error, by the Court below, whereas final judgment ought to have been rendered, by said Court, in said plaintiff's favor. And, in this, that said Court had no jurisdiction of the person of said plaintiff, no process having been served on him in *Jackson* county. And, in this, that said Court, after default against said plaintiff,

Nov. Term,
1851.

ROBERTSON
v.
THOMPSON.

permitted defendant to amend his writ and declaration by striking out the name of *Moore*. And, in this, that said Court set aside the verdict of the jury and awarded a new *venire*."

The first, being the general assignment of error, requires no remark, as there are special assignments. The second, as to the jurisdiction, we think not well grounded. Section 27, p. 674, of the R. S., enacts that, "when one or more of the defendants reside in any other county of this state than the one in which suit is instituted, process may issue to the sheriff, or other proper officer of that county, to be executed, and shall be returned to the Court from which it was issued; but no judgment shall be given against such defendant, unless a writ in the same suit shall have been executed on some resident defendant of the county where the suit was commenced."

In the case before us, a writ was executed on a resident defendant to the suit, as instituted, and who might have been, so far as appears, legally included in the judgment. Both of the defendants having been, therefore, served with legal process, they were under the jurisdiction of the Court, and, for all purposes of legal procedure in the cause, were legally in Court. This being the case, it would seem that sections 98, 99, and 100, p. 685, of the R. S., must apply to the suit, and they authorized the amendment as made. No other construction would give the party the benefit of all these sections. This construction will. The third assignment of error is not valid. *Henry v. The State Bank*, at this term (1). Nor do we think the fourth is. We think the Court might, for good cause, which we must presume to have existed in this case, set aside an assessment of damages, made after a default on the part of the defendant, and award a new *venire*, on plaintiff's motion.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages, and costs.

J. G. Marshall, for the plaintiff.

C. L. Dunham, for the defendant.

(1) See *post*, p. 216.

CRANE v. THE STATE.

Nov. Term,
1851.

CRANE
v.
THE STATE

Indictment against *C.* for keeping a public nuisance. The offense was charged as follows: That said *C.*, late, &c., on, &c., at, &c., in and upon a public street within the limits of the town of *R.*, in said county, did then and there unlawfully, on said street, erect, continue, and maintain, on other days and times thenceforward, for the space of three months then next following, by then and there, in the public street aforesaid, in the limits of the town aforesaid, in the county aforesaid, on the days and times aforesaid, in the public view of the inhabitants of said town and other citizens of the state of *Indiana* who were wont and accustomed to pass and repass on, in, and through said street, erecting, keeping, and letting to mares a certain stallion which he, the said *C.*, did then and there unlawfully keep and let to mares, &c. Held, that the indictment sufficiently showed that *C.* had not provided an inclosure in which his stallion was let to mares; and, though negligently drawn, substantially described the offense.

ERROR to the *Boone* Circuit Court.

Thursday
December 4.

PERKINS, J.—This was an indictment against *Stephen Crane* for keeping a public nuisance, and charged the offense as follows:

“That said *Stephen Crane*, late, &c., on, &c., at, &c., in and upon a public street within the limits of the town of *Royalton*, in said county, did then and there unlawfully, on said street, erect, continue, and maintain, on other days and times thenceforward, for the space of three months then next following, by then and there, in the public street aforesaid, in the limits of the town aforesaid, in the county aforesaid, on the days and times aforesaid, in the public view of the inhabitants of said town and other citizens of the state of *Indiana*, who were wont and accustomed to pass and repass on, in, and through said street, erecting, keeping, and letting to mares a certain stallion which he, the said *Stephen Crane*, did then and there unlawfully keep and let to mares,” &c.

A motion to quash this indictment was overruled; the defendant below was tried upon the plea of not guilty, convicted, and fined.

The statute on which the indictment was found, enacts:
“That it shall not be lawful for any person to keep or let

Nov. Term,
1851.

ROBERTSON
v.
THOMPSON.

permitted defendant to amend his writ and declaration by striking out the name of *Moore*. And, in this, that said Court set aside the verdict of the jury and awarded a new *venire*."

The first, being the general assignment of error, requires no remark, as there are special assignments. The second, as to the jurisdiction, we think not well grounded. Section 27, p. 674, of the R. S., enacts that, "when one or more of the defendants reside in any other county of this state than the one in which suit is instituted, process may issue to the sheriff, or other proper officer of that county, to be executed, and shall be returned to the Court from which it was issued; but no judgment shall be given against such defendant, unless a writ in the same suit shall have been executed on some resident defendant of the county where the suit was commenced."

In the case before us, a writ was executed on a resident defendant to the suit, as instituted, and who might have been, so far as appears, legally included in the judgment. Both of the defendants having been, therefore, served with legal process, they were under the jurisdiction of the Court, and, for all purposes of legal procedure in the cause, were legally in Court. This being the case, it would seem that sections 98, 99, and 100, p. 685, of the R. S., must apply to the suit, and they authorized the amendment as made. No other construction would give the party the benefit of all these sections. This construction will. The third assignment of error is not valid. *Henry v. The State Bank*, at this term (1). Nor do we think the fourth is. We think the Court might, for good cause, which we must presume to have existed in this case, set aside an assessment of damages, made after a default on the part of the defendant, and award a new *venire*, on plaintiff's motion.

Per Curiam.—The judgment is affirmed, with 2 *per cent.* damages, and costs.

J. G. Marshall, for the plaintiff.

C. L. Dunham, for the defendant.

(1) See *post*, p. 216.

CRANE v. THE STATE.

Nov. Term,
1851.CRANE
v.
THE STATE

Indictment against *C.* for keeping a public nuisance. The offense was charged as follows: That said *C.*, late, &c., on, &c., at, &c., in and upon a public street within the limits of the town of *R.*, in said county, did then and there unlawfully, on said street, erect, continue, and maintain, on other days and times thenceforward, for the space of three months then next following, by then and there, in the public street aforesaid, in the limits of the town aforesaid, in the county aforesaid, on the days and times aforesaid, in the public view of the inhabitants of said town and other citizens of the state of *Indiana* who were wont and accustomed to pass and repass on, in, and through said street, erecting, keeping, and letting to mares a certain stallion which he, the said *C.*, did then and there unlawfully keep and let to mares, &c. *Held*, that the indictment sufficiently showed that *C.* had not provided an inclosure in which his stallion was let to mares; and, though negligently drawn, substantially described the offense.

ERROR to the *Boone* Circuit Court.

Thursday
December 4.

PERKINS, J.—This was an indictment against *Stephen Crane* for keeping a public nuisance, and charged the offense as follows:

“That said *Stephen Crane*, late, &c., on, &c., at, &c., in and upon a public street within the limits of the town of *Royalton*, in said county, did then and there unlawfully, on said street, erect, continue, and maintain, on other days and times thenceforward, for the space of three months then next following, by then and there, in the public street aforesaid, in the limits of the town aforesaid, in the county aforesaid, on the days and times aforesaid, in the public view of the inhabitants of said town and other citizens of the state of *Indiana*, who were wont and accustomed to pass and repass on, in, and through said street, erecting, keeping, and letting to mares a certain stallion which he, the said *Stephen Crane*, did then and there unlawfully keep and let to mares,” &c.

A motion to quash this indictment was overruled; the defendant below was tried upon the plea of not guilty, convicted, and fined.

The statute on which the indictment was found, enacts: “That it shall not be lawful for any person to keep or let

Nov. Term,
1851.

ROBERTSON
v.
THOMPSON.

permitted defendant to amend his writ and declaration by striking out the name of *Moore*. And, in this, that said Court set aside the verdict of the jury and awarded a new *venire*."

The first, being the general assignment of error, requires no remark, as there are special assignments. The second, as to the jurisdiction, we think not well grounded. Section 27, p. 674, of the R. S., enacts that, "when one or more of the defendants reside in any other county of this state than the one in which suit is instituted, process may issue to the sheriff, or other proper officer of that county, to be executed, and shall be returned to the Court from which it was issued; but no judgment shall be given against such defendant, unless a writ in the same suit shall have been executed on some resident defendant of the county where the suit was commenced."

In the case before us, a writ was executed on a resident defendant to the suit, as instituted, and who might have been, so far as appears, legally included in the judgment. Both of the defendants having been, therefore, served with legal process, they were under the jurisdiction of the Court, and, for all purposes of legal procedure in the cause, were legally in Court. This being the case, it would seem that sections 98, 99, and 100, p. 685, of the R. S., must apply to the suit, and they authorized the amendment as made. No other construction would give the party the benefit of all these sections. This construction will. The third assignment of error is not valid. *Henry v. The State Bank*, at this term (1). Nor do we think the fourth is. We think the Court might, for good cause, which we must presume to have existed in this case, set aside an assessment of damages, made after a default on the part of the defendant, and award a new *venire*, on plaintiff's motion.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages, and costs.

J. G. Marshall, for the plaintiff.

C. L. Dunham, for the defendant.

(1) See *post*, p. 216.

CRANE v. THE STATE.

Nov. Term,
1851.CRANE
v.
THE STATE

Indictment against *C.* for keeping a public nuisance. The offense was charged as follows: That said *C.*, late, &c., on, &c., at, &c., in and upon a public street within the limits of the town of *R.*, in said county, did then and there unlawfully, on said street, erect, continue, and maintain, on other days and times thenceforward, for the space of three months then next following, by then and there, in the public street aforesaid, in the limits of the town aforesaid, in the county aforesaid, on the days and times aforesaid, in the public view of the inhabitants of said town and other citizens of the state of *Indiana* who were wont and accustomed to pass and repass on, in, and through said street, erecting, keeping, and letting to mares a certain stallion which he, the said *C.*, did then and there unlawfully keep and let to mares, &c. *Held*, that the indictment sufficiently showed that *C.* had not provided an inclosure in which his stallion was let to mares; and, though negligently drawn, substantially described the offense.

ERROR to the *Boone* Circuit Court.

Thursday
December 4.

PERKINS, J.—This was an indictment against *Stephen Crane* for keeping a public nuisance, and charged the offense as follows:

“That said *Stephen Crane*, late, &c., on, &c., at, &c., in and upon a public street within the limits of the town of *Royalton*, in said county, did then and there unlawfully, on said street, erect, continue, and maintain, on other days and times thenceforward, for the space of three months then next following, by then and there, in the public street aforesaid, in the limits of the town aforesaid, in the county aforesaid, on the days and times aforesaid, in the public view of the inhabitants of said town and other citizens of the state of *Indiana*, who were wont and accustomed to pass and repass on, in, and through said street, erecting, keeping, and letting to mares a certain stallion which he, the said *Stephen Crane*, did then and there unlawfully keep and let to mares,” &c.

A motion to quash this indictment was overruled; the defendant below was tried upon the plea of not guilty, convicted, and fined.

The statute on which the indictment was found, enacts: “That it shall not be lawful for any person to keep or let

Nov. Term,
1851.

ROBERTSON
v.
THOMPSON.

permitted defendant to amend his writ and declaration by striking out the name of *Moore*. And, in this, that said Court set aside the verdict of the jury and awarded a new *venire*."

The first, being the general assignment of error, requires no remark, as there are special assignments. The second, as to the jurisdiction, we think not well grounded. Section 27, p. 674, of the R. S., enacts that, "when one or more of the defendants reside in any other county of this state than the one in which suit is instituted, process may issue to the sheriff, or other proper officer of that county, to be executed, and shall be returned to the Court from which it was issued; but no judgment shall be given against such defendant, unless a writ in the same suit shall have been executed on some resident defendant of the county where the suit was commenced."

In the case before us, a writ was executed on a resident defendant to the suit, as instituted, and who might have been, so far as appears, legally included in the judgment. Both of the defendants having been, therefore, served with legal process, they were under the jurisdiction of the Court, and, for all purposes of legal procedure in the cause, were legally in Court. This being the case, it would seem that sections 98, 99, and 100, p. 685, of the R. S., must apply to the suit, and they authorized the amendment as made. No other construction would give the party the benefit of all these sections. This construction will. The third assignment of error is not valid. *Henry v. The State Bank*, at this term (1). Nor do we think the fourth is. We think the Court might, for good cause, which we must presume to have existed in this case, set aside an assessment of damages, made after a default on the part of the defendant, and award a new *venire*, on plaintiff's motion.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages, and costs.

J. G. Marshall, for the plaintiff.

C. L. Dunham, for the defendant.

(1) See *post*, p. 216.

CRANE V. THE STATE.

Nov. Term,
1851.CRANE
V.
THE STATE.

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ERROR to the *Boone* Circuit Court.

Thursday
December 4.

PERKINS, J.—This was an indictment against *Stephen Crane* for keeping a public nuisance, and charged the offense as follows:

“That said *Stephen Crane*, late, &c., on, &c., at, &c., in and upon a public street within the limits of the town of *Royalton*, in said county, did then and there unlawfully, on said street, erect, continue, and maintain, on other days and times thenceforward, for the space of three months then next following, by then and there, in the public street aforesaid, in the limits of the town aforesaid, in the county aforesaid, on the days and times aforesaid, in the public view of the inhabitants of said town and other citizens of the state of *Indiana*, who were wont and accustomed to pass and repass on, in, and through said street, erecting, keeping, and letting to mares a certain stallion which he, the said *Stephen Crane*, did then and there unlawfully keep and let to mares,” &c.

A motion to quash this indictment was overruled; the defendant below was tried upon the plea of not guilty, convicted, and fined.

The statute on which the indictment was found, enacts: “That it shall not be lawful for any person to keep or let

Nov. Term,
1851.

ROBERTSON
v.
THOMPSON.

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In the case before us, a writ was executed on a resident defendant to the suit, as instituted, and who might have been, so far as appears, legally included in the judgment. Both of the defendants having been, therefore, served with legal process, they were under the jurisdiction of the Court, and, for all purposes of legal procedure in the cause, were legally in Court. This being the case, it would seem that sections 98, 99, and 100, p. 685, of the R. S., must apply to the suit, and they authorized the amendment as made. No other construction would give the party the benefit of all these sections. This construction will. The third assignment of error is not valid. *Henry v. The State Bank*, at this term (1). Nor do we think the fourth is. We think the Court might, for good cause, which we must presume to have existed in this case, set aside an assessment of damages, made after a default on the part of the defendant, and award a new *venire*, on plaintiff's motion.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages, and costs.

J. G. Marshall, for the plaintiff.

C. L. Dunham, for the defendant.

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CRANE v. THE STATE.

Nov. Term,
1851.CRANE
v.
THE STATE.

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ERROR to the *Boone* Circuit Court.

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Thursday
December 4.

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A motion to quash this indictment was overruled; the defendant below was tried upon the plea of not guilty, convicted, and fined.

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Nov. Term,
1851.

ROBERTSON
v.
THOMPSON.

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In the case before us, a writ was executed on a resident defendant to the suit, as instituted, and who might have been, so far as appears, legally included in the judgment. Both of the defendants having been, therefore, served with legal process, they were under the jurisdiction of the Court, and, for all purposes of legal procedure in the cause, were legally in Court. This being the case, it would seem that sections 98, 99, and 100, p. 685, of the R. S., must apply to the suit, and they authorized the amendment as made. No other construction would give the party the benefit of all these sections. This construction will. The third assignment of error is not valid. *Henry v. The State Bank*, at this term (1). Nor do we think the fourth is. We think the Court might, for good cause, which we must presume to have existed in this case, set aside an assessment of damages, made after a default on the part of the defendant, and award a new *venire*, on plaintiff's motion.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages, and costs.

J. G. Marshall, for the plaintiff.

C. L. Dunham, for the defendant.

(1) See *post*, p. 216.

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Nov. Term,
1851.CRANE
v.
THE STATE.

Indictment against *C.* for keeping a public nuisance. The offense was charged as follows: That said *C.*, late, &c., on, &c., at, &c., in and upon a public street within the limits of the town of *R.*, in said county, did then and there unlawfully, on said street, erect, continue, and maintain, on other days and times thenceforward, for the space of three months then next following, by then and there, in the public street aforesaid, in the limits of the town aforesaid, in the county aforesaid, on the days and times aforesaid, in the public view of the inhabitants of said town and other citizens of the state of *Indiana* who were wont and accustomed to pass and repass on, in, and through said street, erecting, keeping, and letting to mares a certain stallion which he, the said *C.*, did then and there unlawfully keep and let to mares, &c. *Held*, that the indictment sufficiently showed that *C.* had not provided an inclosure in which his stallion was let to mares; and, though negligently drawn, substantially described the offense.

ERROR to the *Boone* Circuit Court.

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PERKINS, J.—This was an indictment against *Stephen Crane* for keeping a public nuisance, and charged the offense as follows:

“That said *Stephen Crane*, late, &c., on, &c., at, &c., in and upon a public street within the limits of the town of *Royalton*, in said county, did then and there unlawfully, on said street, erect, continue, and maintain, on other days and times thenceforward, for the space of three months then next following, by then and there, in the public street aforesaid, in the limits of the town aforesaid, in the county aforesaid, on the days and times aforesaid, in the public view of the inhabitants of said town and other citizens of the state of *Indiana*, who were wont and accustomed to pass and repass on, in, and through said street, erecting, keeping, and letting to mares a certain stallion which he, the said *Stephen Crane*, did then and there unlawfully keep and let to mares,” &c.

A motion to quash this indictment was overruled; the defendant below was tried upon the plea of not guilty, convicted, and fined.

The statute on which the indictment was found, enacts:
“That it shall not be lawful for any person to keep or let

Nov. Term,
1851.

CARSON
v.
STEAM-BOAT
TALMA.

to mares any stallion or jack, within the limits of any town or village in the state, or within two hundred yards thereof, unless such person shall provide an inclosure so arranged as to obstruct the view from all the inhabitants in the town and vicinity as aforesaid." A penalty of 10 dollars is annexed.

It is plain that the indictment in this case was very carelessly drawn, but we think it contains, substantially, the statutory offense.

It is particularly urged against it, that it does not allege that *Crane* had not provided an inclosure in which his stallion was let to the mares in question. The indictment charges that the letting to mares was on a public street of the town, and in view of its inhabitants. This sufficiently negatives that it was done within an inclosure which screened it from the public view. *State v. Brown*, 8 Blackf. 69.

Per Curiam.—The judgment is affirmed with costs.

C. C. Nave, for the plaintiff.

D. Wallace, for the state.

CARSON and Others v. THE STEAM-BOAT TALMA.

In a proceeding in attachment against a steam-boat, under article 2 of chapter 42 of the R. S. 1843, the giving of a bond for the discharge of the boat, as authorized by the statute, operates virtually to set aside a previous judgment by default rendered against the boat.

Where a judgment had been rendered by default against the boat and one of the defendants at the term of the Court next after the rendition of the judgment moved to set it aside, it was held that such defendant did not, by making the motion, waive any objection to the attachment.

The giving of the bond for the purpose of having the boat discharged, is not a waiver of any objection to the attachment.

The omission, in the affidavit on which the writ of attachment issues, of the name of the person who contracted the debt, is fatal.

Thursday,
December 4

ERROR to the *Clark* Circuit Court.

BLACKFORD, J.—On the 18th of November, 1848, one

Henry G. Carson filed in the clerk's office of the Circuit Court an affidavit of his demand against the steam-boat *Talma*. The demand was for a debt due for work and labor, &c. (1). On the same day, an attachment, founded on said affidavit, was issued against the boat. This attachment commanded the sheriff to seize the boat, and summon the owners if found, or, if not found, then the clerk, or some other officer of the boat, to appear to the suit at the then next term of the Court, on the first *Monday* in *February*, 1849. The sheriff's return to the attachment is as follows:

Nov. Term,
1851.

CARSON
V.
STEAM-BOAT
TALMA.

"As within commanded, I have seized and detained the steam-boat *Talma*, tackle, and apparel, and finding no owners in my bailiwick, I served this writ personally, by reading, on *James B. Gallagher* who appears to be in charge of said boat. I also left a true copy of this writ on board said boat. *November 20, 1848. John Stockwell, sheriff C. C.*"

On the 6th of *February*, 1849, several persons, with said *Carson*, filed demands against said boat for debts due them for work and labor, &c.

Afterwards, at said *February* term, 1849, a judgment by default was rendered against the boat in favor of said creditors, and the damages on some of the claims were assessed by a jury. The demand of *Carson* does not appear to have been before the jury for assessment.

On the 1st of *May*, 1849, a bond executed by one *Watson* and two other persons, payable to said *Carson*, and approved of by the clerk of the Court, was filed in the clerk's office. This bond was conditioned for the payment of all demands pending against the boat and which should be found due on the final determination of said cause, with the costs. Upon the filing of said bond the boat was discharged.

At the *August* term, 1849, on motion of the owners of the boat, the judgment by default was, for good cause shown, set aside; and, afterwards, at the same term, the Court, on motion of said owners of the boat, quashed the

Nov. Term,
1851.

CARSON
v.
STEAM-BOAT
TALMA.

writ of attachment, on the ground of the insufficiency of the affidavit on which the writ issued.

The plaintiffs in error are *Carson* and the other persons who filed claims against the boat.

The plaintiffs contend that the defendants, by moving to set aside the judgment by default, waived all objections to the attachment. We do not think so. The judgment by default was against the boat, and when the boat was discharged, that judgment could have no effect. The owners of the boat, after such discharge, were the only defendants, and no judgment for the plaintiffs could be afterwards rendered, except against those owners personally. *Jones et al. v. Gresham*, 6 Blackf. 291. The judgment by default was virtually set aside by the release of the boat. When the boat was discharged, the cause was in the same situation in which it would have been had the default not been entered. The motion to set aside the default, under those circumstances, cannot be considered as curing any defect in the attachment. There is no doubt but that an appearance to a suit may cure a defect in the process, but there are many motions which can be made before an appearance to the suit, and we think the motion now in question must certainly be one of that kind.

We are next to examine whether the giving of the bond for the purpose of having the boat discharged, was a waiver of any objection to the attachment; and we do not think it was. There have been two cases in this Court in which a question very similar to the one now before us was decided. The first of those cases was as follows: One *Blaney* commenced a suit by foreign attachment against one *Burnett* and others. The attachment issued on the 23d of *June*, 1829, was levied on the same day on the lands of *Burnett*, and was returned at the *July* term of the Court. At that term, notice of the pendency of the attachment was ordered to be published. In the ensuing vacation, the defendants entered special bail. At the next term, the plaintiff filed his declaration,

and the defendant moved the Court to quash the attachment for the insufficiency of the affidavit and the bond; and the motion was sustained. It was objected, on error, that the motion to quash was made too late; but the judgment was affirmed. *Blaney v. Findley et al.*, 2 Blackf. 338. The other was also a case of attachment, in which special bail had been entered in vacation, and the Circuit Court, at the next term, on motion, quashed the attachment. It was held, on error, that the motion to quash was made in time. *Root et al. v. Monroe*, 5 Blackf. 594. According to both those cases, the giving of special bail in vacation did not prevent a motion at the next term to quash the writ.

Nov. Term,
1851.

CARSON
v.
STEAM-BOAT
TALMA.

The *English* decisions relative to the question under consideration are as follows: The giving of a bail-bond in vacation for the purpose of being discharged from an arrest in a civil suit, does not prevent the defendant from moving, at the next term, to have the writ set aside for a defect in the affidavit. *Jarrett v. Dillon*, 1 East, 18. But if, at the term to which the writ is returnable, the defendant put in special bail, he cannot, afterwards, move the Court to quash the writ. *D'Argent v. Vivant*, 1 East, 330. The reason of the decision in the last cited case is, that the defendant, by putting in special bail after he had had an opportunity to move to quash the writ, had waived the objection. That reason does not apply to the case now before us, because the motion was made, for aught that appears, at the first term after the defendants had notice of the suit, and before they had taken any step in the suit, at that term, except to have the default set aside.

The objection to the affidavit on which the attachment issued is, that it does not state the name of the person who contracted the debt. That objection is fatal. *The Steam-Boat Tom Bowling v. Hough*, 5 Blackf. 188.

Per Curiam.—The judgment is affirmed with costs.

R. Crawford, for the plaintiff.

C. Dewey, for the defendant.

(1) This action was founded on article 2, of chapter 42, R. S. 1843, and was for labor done upon the steam-boat *Talma*, and for supplies and mate-

Nov. Term,
1851.

TRULLINGER
v.
WEBB.

rials furnished for the boat. Said article enacts that boats built, repaired, or equipped within the jurisdiction of this state, or by citizens of this state, without the jurisdiction thereof, which shall afterwards come within such jurisdiction, shall be liable for all debts contracted by the master, owner, or consignee, on account of work done and supplies or materials furnished, &c., for or towards the building, repairing, fitting, furnishing, or equipping such boats; and such debts shall be a lien on such boats, their tackle, apparel, and furniture, &c. Where the sum demanded exceeds 100 dollars, if the person having such demand, shall file with the clerk of the Circuit Court where the boat is, a statement of his claim, annexing thereto an affidavit that the claim is justly due and owing, he may have a warrant of attachment issued against the boat, directing the seizure and detention of the boat, and its tackle, apparel, and furniture, by the sheriff, until the final determination of the proceedings under the attachment, and until payment is made of the demand, if judgment be rendered in favor of the claimant. Upon the return of the warrant, other creditors having demands against the boat of the description above-named, may join in the declaration, &c. The boat may, however, be discharged from arrest and detention, if the master, owner, or consignee shall, before final judgment, give bond and surety, to be approved of by the clerk who issued the warrant, conditioned to pay and satisfy all demands pending against the boat which shall be adjudged to be due and owing, on the determination of the cause, or if he then pay such demands, together with the costs of the proceedings. R. S. 1843, p. 778.

TRULLINGER v. WEBB.

The circumstance that a juror is related to one of the parties by marriage with his niece, is a sufficient cause of challenge by the adverse party.

A party may object to the examination of a juror without oath, as to his competency; but if he permits the question to be put to the juror, and answered by him, without requiring him to be sworn, he waives the objection.

Parol evidence is not admissible to prove a contemporaneous understanding and agreement contrary to the terms of a deed between the parties.

Thursday,
December 4.

ERROR to the *Fountain* Circuit Court.

BLACKFORD, J.—This was an action of trespass *quare clausum fregit*, brought by *Webb* against *Trullinger*. The *gravamen* is, that the defendant, with force and arms, broke and entered two certain coal-banks or veins of coal of the plaintiff, situate on the east half of the north-west

quarter of section thirty-one, township nineteen north, range eight west, in *Fountain* county, *Indiana*, and dug out, &c.

Nov. Term,
1851.

TRULLINGER

v.
WEBB.

The defendant pleaded not guilty. Verdict and judgment for the plaintiff.

The first error assigned is, that the Court improperly overruled a challenge to one of the jurors.

The bill of exceptions, on that subject, is as follows: The defendant challenged *Jacob Kinney*, one of the jurors, for the following cause, to-wit, that said juror, on being interrogated by the defendant, without being sworn to answer questions, disclosed the fact that he was related to the plaintiff in the following degree—by marriage with the plaintiff's niece; and the said juror, after being sworn to try said cause, repeated that said relationship existed, without being sworn to that fact; whereupon the defendant moved the Court to discharge said juror, which motion was overruled, and the juror permitted to be sworn in chief, and serve on the jury, in said cause. To the overruling of which motion the defendant excepts.

We have no doubt but that the cause of challenge was sufficient. Lord *Coke's* language, on the subject, is as follows: Affinity or alliance by marriage is a principal challenge, and equivalent to consanguinity, when it is between either of the parties, as if the plaintiff or defendant marry the daughter or cousin of the juror, or the juror marry the daughter or cousin of the plaintiff or defendant, and the same continues, or issue be had. *Coke Litt.* 157.

The plaintiff contends that the juror, when questioned as to the cause of the challenge, should have been sworn. There is no doubt but that the plaintiff might have objected to the examination of the juror without oath; but the plaintiff, by permitting the questions to be put to the juror, and answered by him, without requiring him to be sworn, waived the objection. The Circuit Court, instead of permitting the juror to be sworn on the jury, should have sustained the challenge.

The second error assigned relates to the rejection of certain parol evidence offered by the defendant.

Nov. Term,
1851.

TEULLINGER
v.
WEBB.

On the trial, the plaintiff gave in evidence a conveyance for the tract of land hereinbefore described, executed by him and his wife to the defendant. In that conveyance, there is the following reservation: "Reserving, however, to ourselves, our heirs, and assigns forever, the exclusive privilege and power of excavating the earth and removing the stone-coal from two coal-banks, situate on a certain branch or creek running through the said lot of land; the said coal-banks situated, one on the west side and one on the east side of said branch or creek; and also reserving sufficient ground for a road on the east line of said lot to a place opposite said coal-banks; thence the nearest and best way to said coal-banks to remove said coal on."

Whereupon the defendant offered to prove that, at the time of said conveyance and reservation, it was the understanding and agreement of the parties to said deed, that the coal for which this suit is brought was to be the coal of the defendant; also that a coal-bank, at the time of the execution of said deed, was understood to be a visible bank of coal, and not the entire vein of coal, all of which, except the four visible coal-banks, the Court refused to permit the defendant to prove to the jury. To the refusal of the Court to permit the defendant to make said proof, the defendant excepts.

We think the Court did right in excluding this parol evidence. The understanding and agreement of the parties, relative to the reservation, must be ascertained by the face of the conveyance itself. Evidence of the circumstances surrounding the parties when the conveyance, with the reservation, was executed, was admissible, in order to enable the Court to give a proper construction to the face of the conveyance. But that is a different matter. It is not shown that there is any latent ambiguity in the conveyance.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. H. Mallory, for the plaintiff.

H. S. Lane and *S. C. Willson*, for the defendant.

SHERRY v. REYNOLDS.

Nov. Term,
1851.SHERRY
v.
REYNOLDS.

Irrelevant instructions, or harmless erroneous instructions, given to the jury, furnish no ground for reversing a judgment.

ERROR to the *Tippecanoe* Circuit Court.Saturday,
December 6.

PERKINS, J.—*John Sherry* brought an action of trespass against *Matthew H. Winton* and *William F. Reynolds*, charging an assault and battery and a false imprisonment. The defendants severed in pleading. *Reynolds* pleaded the general issue. A jury was called and the issue tried. The plaintiff obtained a verdict for 50 dollars damages against *Reynolds*, and judgment on the verdict. The issue upon *Winton's* plea has not been, so far as appears, submitted for trial. *Sherry*, dissatisfied with the amount of damages he obtained, prosecutes this writ of error.

The facts are these: The Circuit Court of *Carroll* county issued a writ of attachment against said *Sherry* and others for contempt in disobeying an injunction awarded by said Court. The writ was directed to said *Winton*, the sheriff of *Tippecanoe* county, commanding him to arrest *Sherry*, &c. *Sherry* resided in *Tippecanoe* county. *Winton* undertook to arrest him. *Sherry* resisted, and *Winton* commanded the assistance of *Reynolds*. *Reynolds* assisted, *Sherry* was taken and imprisoned, and this suit was instituted to recover damages therefor.

On the trial, the defendant read in evidence, in mitigation of damages, the writ of attachment, &c., to the sheriff, *Winton*. This is assigned for error. That writ was illegal upon its face, the Circuit Court of *Carroll* county having no authority to issue such a writ to the sheriff of another county, and was, of course, not a protection to those acting under it; but we think it was right that it should go in evidence to aid in explaining the circumstances and character of the arrest, as the jury might consider these in the assessment of damages. See *Hall v. Warren et al.*, 2 McLean 332.

The Court instructed the jury:

Nov. Term,
1851.

SHERRY
v.
REYNOLDS.

1. "That the proceedings on the attachment and warrant of commitment on which Mr. *Sherry* was arrested, were in the name of *The State of Indiana v. Sherry* and others, and were independent of, and no part of, the civil suit pending between the bank and the *Sherrys*.

2. "That Mr. *Reynolds* was as much bound as any other stranger to obey the command of the sheriff in serving said process, if the process had been legally issued."

Reynolds was in the bond given upon the granting of the injunction above named, and was a stockholder and director in the bank mentioned in the first instruction.

These instructions were objected to; but we do not see that they could have done any harm; for, whether the attachment was, or was not, to be regarded as an entirely separate proceeding from the suit by the bank, (a point we do not decide,) was a question that could not influence this case. The Court might have issued the writ, *mero motu*, as well in one case as the other; or the bank might have moved for it as well in one case as the other. Her agency in procuring it, if that was to have any weight, might have been as much, whether it was regarded as part of a pending, or as a new, suit; and that agency might have been shown to the jury. As to the injunction, its legality is not denied in this suit, nor in any other, so far as we are advised.

The second instruction asserts a truth, and it was not pretended below that the attachment-writ was legal. We do not know what other instructions were given, but we do know that said writ was not held out to the jury as legal, for the decision of the Supreme Court to the contrary was given in evidence to them; and harmless erroneous instructions are not ground for reversing a judgment.

There is no brief in the case, and no other points appear, by the record, to have been made.

Per Curiam.—The judgment is affirmed, with costs.

R. C. Gregory, J. Pettit, and S. A. Huff, for the plaintiff.
A. S. White, for the defendant.

BUTTERFIELD and Others v. BEALL.

Nov. Term,
1851.

BUTTERFIELD

v.

BEALL.

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If a wife, at the time of her marriage, is seized of an estate of inheritance in land, the husband, upon the marriage, becomes possessed of an estate therein during their joint lives, which he may convey.

An attempt by a husband possessed of such an estate, to convey the fee of the land, will not render his deed ineffectual to convey his actual estate.

An instrument purporting to convey land in this state, in order to be effectual, must be executed according to our law.

The R. S. 1843 require that a power of attorney to convey lands in this state, shall be executed with the formalities required in the execution of a deed of conveyance.

The certificate of acknowledgment to a power of attorney, executed by husband and wife in another state, to convey land in this state, did not show that the wife was examined without the hearing of her husband. *Held*, that the attorney was not authorized, under the power, to convey the estate of the wife.

A deed made by an attorney under a power executed by his principals (valid as to the husbands who executed the same but invalid as to their wives,) was as follows: This indenture made, &c., between A. B., of, &c., attorney in fact for C. D. and E. D., his wife, and F. G. and E. G., his wife, parties of the first part, and J. K., of, &c., of the second part, witnesseth, that the said A. B., party of the first part, in consideration of, &c., to the said party of the first part by the said party of the second part in hand paid, &c., hath granted, bargained, and sold, &c., unto the said party of the second part, all the following described piece or parcel of land, (describing it,) being in the county of Ripley and state of Indiana, &c. To have and to hold, &c. And the said party of the first part, his heirs, executors, and administrators the aforesaid tract, &c., to the said J. K., his heirs, &c., will forever warrant and defend. In witness whereof the said A. B., attorney, hath hereunto set their hands and seals the day and year, &c. C. D., [seal]. E. D., [seal]. F. G., [seal]. E. G., [seal]. By A. B., [seal], their attorney in fact. The deed was attested by two witnesses, and the justice before whom the acknowledgment was taken, certified that A. B., "attorney aforesaid," personally appeared before him, and "acknowledged the foregoing instrument of writing to be his voluntary act and deed." *Held*, that the deed of the attorney was sufficient to convey the estates of the husbands.

APPEAL from the Ripley Circuit Court.

Saturday,
December 6

PERKINS, J.—*John Beall* filed a bill in chancery in the *Ripley* Circuit Court, from which it appears, that *Charles B. Johnson* was, in his lifetime, the owner of the lands hereinafter described; that, at his death, said lands were inherited by *Caroline Johnson* and *Adaline Johnson*, his heirs; that said *Caroline* intermarried with *Abel Butterfield*, and said *Adaline* with *Richard Bush*, and that afterwards the four executed the following power of attorney:

Nov. Term,
1851.

BUTTERFIELD
v.
BEALL.

"Know all men that we, *Abel Butterfield* and *Caroline Butterfield*, his wife, (late *Caroline Johnson*.) and *Richard Bush* and *Adaline Bush*, his wife, (late *Adaline Johnson*.) of the city of *Nauvoo*, *Hancock* county, *Illinois*, have made," &c., "and by these presents do make," &c., "*Jonathan C. Wright*, of said *Nauvoo*, our true and lawful attorney, for us, and in our names, to take possession of the following pieces and parcels of land, viz., the south-east quarter," &c., "being in the county of *Ripley* and state of *Indiana*," &c.; "and the said *Jonathan C. Wright*, by virtue of these presents, as our attorney, is fully authorized and empowered to bargain, sell, and convey the said lands, or any part of them, with their hereditaments and appurtenances, to any person or persons, upon such terms as to him shall seem just and equitable, and to execute and deliver good and sufficient deeds and conveyances for the same and every part thereof, according to law, warranting the same," &c., "and to affix our several names to such deeds and conveyances, we hereby approving and ratifying," &c. "In witness," &c.

This power of attorney is signed and sealed by the parties, and has appended the following acknowledgment:

"State of *Illinois*, *Hancock* county, city of *Nauvoo*, ss. I, *William W. Phelps*, notary public in and for the city of *Nauvoo*, county and state aforesaid, duly commissioned by the governor of said state, do certify that *Abel Butterfield*, *Caroline Butterfield*, his wife, *Richard Bush* and *Adaline Bush*, his wife, whose signatures appear to the foregoing power of attorney, and who are personally known to me to be the persons described in, and who executed the same, did severally acknowledge that they had executed said power of attorney for the uses and purposes therein mentioned. And the said *Caroline Butterfield* and *Adaline Bush* having been by me made acquainted with the contents of said power of attorney, and examined separate and apart from their said husbands, acknowledged that they had executed the same," &c. "In testimony," &c. Signed and sealed by the notary.

There is also a note succeeding the acknowledgment, that the instrument had been recorded.

Having this power of attorney, it appears that *Wright* came to *Indiana* and sold to *John Beall* a part of the lands described in it, and executed to him a deed, of which the subjoined is a copy :

Nov. Term
1851.
BUTTERFIELD
v.
BEALL.

"This indenture, made this twenty-fifth day of *March*, A. D., 1846, between *Jonathan C. Wright*, of the county of *Hancock*, state of *Illinois*, attorney in fact for *Abel Butterfield*, *Caroline Butterfield*, his wife, and *Richard Bush* and *Adaline Bush*, his wife, parties of the first part, and *John Beall*, of the county of *Ripley* and state of *Indiana*, of the second part, witnesseth, that the said *Jonathan C. Wright*, party of the first part, for and in consideration of the sum of four hundred and seventy-five dollars to the said party of the first part by the said party of the second part in hand paid, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain, and sell unto the said party of the second part, all the following described piece or parcel of land, to-wit, the south-east quarter of section fifteen, in township seven north, of range twelve east, of lands subject to sale at *Jeffersonville, Indiana*, being in the county of *Ripley* and state of *Indiana*, containing one hundred and sixty acres, be the same more or less, together with all the appurtenances thereunto belonging, to have and to hold the above described premises with the appurtenances to the same belonging, to the said party of the second part, his heirs and assigns forever. And the said party of the first part, his heirs, executors, and administrators, the aforesaid tract of land, with the appurtenances, to the said *John Beall*, his heirs and assigns, will forever warrant and defend. In witness whereof, the said *Jonathan C. Wright*, attorney, hath hereunto set their hands and seals, the day and year first above written. *Abel Butterfield*, [seal]. *Caroline Butterfield*, [seal]. *Richard Bush*, [seal]. *Adaline Bush*, [seal]. By *Jonathan C. Wright*, [seal], their attorney in fact.

"Signed, sealed, and delivered in presence of *Abel Cavender, John M. Cavender*.

"State of *Indiana*, *Ripley* county, ss. Personally ap-

Nov. Term,
1851.

BUTTERFIELD
v.
BEALL.

peared before the undersigned, one of the justices of the peace of said county, *Jonathan C. Wright*, attorney aforesaid, and acknowledged the foregoing instrument of writing to be his voluntary act and deed for the purposes therein mentioned. Given under my hand and seal, this 25th day of *March*, 1846. *John Cavender*, [seal], justice of the peace."

It further appears that afterwards, *Stephen S. Harding*, an attorney at law, supposing the conveyance from *Wright* to *Beall* inoperative, instituted an action of ejectment upon the demise of *Butterfield* and *Bush*, and their wives, to recover possession of the land attempted to be conveyed; and the Circuit Court of *Ripley* county being of opinion that said conveyance was void, he succeeded in the action and ousted *Beall* of possession. It also appears that afterwards, in 1850, said *Harding* caused to be instituted in the *Ripley* Circuit Court, against said *Beall*, an action for the mesne profits of said land during said *Beall's* possession, and that said action was pending at the filing of this bill. It is alleged by *Beall* that *Butterfield* and wife, and *Bush* and wife, are residing in the territory of *Utah*, and are insolvent; and that *Wright* is in parts unknown. He prays an injunction restraining the prosecution of the suit for mesne profits, and also prays for the perfection of the conveyance to him of the land, &c.

Upon the filing of the bill, verified by oath, an injunction was moved for as prayed, and the Court granted it. Thereupon, the defendants below appealed to this Court.

We have concluded that the injunction in this case cannot be sustained.

Upon the marriage of *Caroline Johnson* with *Abel Butterfield*, said *Butterfield* became possessed of an estate for their joint lives in her real property. So in the case of *Adaline Johnson* and *Richard Bush*. That estate the husbands could respectively convey; 2 Kent, 133; and an attempt by them to convey the fee-simple would not render void their conveyance as to the interest they did possess. R. S. p. 417, s. 23.—Id. p. 425, s. 64.—4 Kent, 83. If, then, *Butterfield* and *Bush* made a conveyance of the land

in question, binding upon them, to *Beall*, in *March*, 1846, as they and their wives, according to the bill, are still living, the right of possession of said land is in *Beall*, the mesne profits of it belong to him, and he had a defense at law to the ejectment suit. We think they did make such a conveyance. It will be admitted that the deed made (which we have set out above) is inoperative as to the wives of said *Butterfield* and *Bush*, and will not bar an entry by them on the decease of their said husbands. The land being situate in this state, it was necessary that the instrument purporting to convey it should be executed according to our law—the *lex loci rei sitæ*. 1 Blackf. 372. And as, in the present case, the conveyance was made by the owners through an attorney, it was necessary that the instrument transferring to said attorney the power to convey, should be executed with the same formalities as are required in the execution of a deed of conveyance. R. S. p. 421, s. 43. That instrument was not so executed. In the acknowledgment it was not certified that the wives were examined “without the hearing” of their husbands. This should have been done. R. S. p. 421, ss. 40, 41, and 42 (1). But the acknowledgment is well certified as to the husbands. The power to *Wright* was valid as against them; and his deed to *Beall* under it, though very inartificially drawn, we have determined, not however without a good deal of hesitation, should be held operative to the extent of the power that had been legally conveyed to him. See *Story on Agency*, s. 147, *et seq.* The deed was signed and sealed by him with the names and seals of his principals, and they are once designated in it as the parties of the first part, and we think should be bound by it. It was *Wright's* intention to act under the power granted him; and justice will be promoted and litigation, perhaps, saved, by holding the deed operative. Under this view of the case, *Beall's* remedy is at law, as to the possession of the land; and there has been no adjudication below upon the question of his right to a decree perfecting the deed as against the female defendants

Nov. Term,
1851.

BUTTERFIELD
v.
BEALL.

Nov. Term, 1851. in the bill. See Story *supra*; and *Edmonson v. Orr*, 12 Smeade and Marshall, 541.

BEALL
v.
DOE.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

J. Ryman, for the appellant.

E. Dumont, for the appellees.

(1) See *Pardun v. Dobesberger*, May term, 1852, *post*.

BEALL v. DOE on the Demise of BUTTERFIELD and Others.

ERROR to the *Ripley* Circuit Court.

Per Curiam.—Ejectment below by *Doe* on the demise of *Butterfield* and others against *John Beall*. Recovery by the plaintiff of the land sued for.

Title was shown in the plaintiff's lessors—*Abel Butterfield*, *Caroline Butterfield*, *Richard Bush*, and *Adaline Bush*. The defendant then gave in evidence, the power of attorney from said persons to *Jonathan C. Wright*, which is set out in the opinion in the case of *Butterfield et al. v. Beall*, at the present term of this Court (1). And, also, the deed of conveyance set out in the same opinion from said *Wright*, under said power, to the above-named *Beall*. The Court gave judgment for the plaintiff below in this case on the ground that said deed conveyed nothing to *Beall*. We have decided in the case above named that said deed did convey the legal title to *Beall*, and, as he was in possession, the judgment against him was erroneous.

The judgment is reversed, with costs. Cause remanded, &c.

E. Dumont, for the plaintiff.

J. Ryman, for the defendant.

(1) See the next preceding case.

PARISH and Another v. THE STATE on the Relation of
McFADDEN and Others.

Nov. Term,
1851.

PARISH
v.
THE STATE.

In debt upon a bond, the plea of *nil debet* is bad upon general demurrer.

ERROR to the Cass Circuit Court.

Saturday,
December 6.

BLACKFORD, J.—This was an action of debt commenced in 1846, by the state, on the relation of *McFadden* and others, against *Parish* and another.

The suit is founded on a penal bond executed by said *Parish*, the principal, and the other defendants, his sureties. The bond is conditioned for the faithful discharge, by *Parish*, of his duty as coroner of *Cass* county.

The declaration assigns, as a breach of the condition of the bond, that the relators, *McFadden* and others, on the 3d of *September*, 1842, recovered judgment against one *Ross* and others for the sum of 270 dollars, *Ross* being sheriff of said county; that the relators sued out a *feri facias* upon said judgment, on the 15th of *December*, 1842, and delivered the same to said *Parish*, as coroner as aforesaid, to be executed; that said execution was returnable on the 13th of *June*, 1843; and that said *Parish* never returned said execution.

The defendants pleaded *nil debet*, and several other pleas in bar. The plea of *nil debet* was demurred to generally, and the Court sustained the demurrer. The other pleas led to issues of fact.

The cause was submitted to the Court, and judgment rendered for the plaintiff for the penalty of the bond, to be discharged by the payment of 219 dollars and 65 cents, with costs.

The first error assigned is, that the demurrer to the plea of *nil debet* should have been overruled. That demurrer was rightly sustained. The suit being on a bond, *nil debet* was a bad plea on general demurrer. *Tate v. Wymond*, 7 Blackf. 240.

The second error assigned is, that the plaintiff could not be entitled to more than nominal damages.

Nov. Term,
1851.

USHER
v.
CORNWELL.

The evidence is not set out in the record, and the amount assessed by the Court, on the payment of which the judgment would be discharged, is less than the sum for which the execution issued. There does not appear, therefore, to be any ground for the second assignment of errors.

Per Curiam.—The judgment is affirmed, with 5 *per cent.* damages and costs.

J. W. Wright, for the plaintiff.

J. Morrison and *S. Major*, for the defendant.

USHER v. CORNWELL.

In a suit by an infant before a justice of the peace, the naming of a person as next friend, in the summons, may be considered as an appointment of the person as next friend.

A defendant who was sued by an infant before a justice of the peace, appeared to the suit before the justice, went to trial on the merits, and suffered judgment to be rendered against him, without making the objection that the next friend of the infant had not consented in writing to his appointment. The cause was appealed to the Circuit Court, where the defendant moved to dismiss the suit for the want of such written consent of the next friend; but the Circuit Court was not informed, by affidavit or otherwise, that the defendant did not know of the omission complained of, whilst the suit was pending before the justice. *Held*, that the Circuit Court correctly refused to dismiss the suit.

Saturday,
December 6.

ERROR to the *Clay* Circuit Court.

BLACKFORD, J.—This suit, which was founded on contract, was commenced before a justice of the peace, and was taken by appeal to the Circuit Court.

The justice's transcript is to the following effect:

James M. Cornwell, by his next friend, *George H. Cornwell*, v. *Moses Usher*.

This action is founded upon an account. Damages \$30.00.

Be it remembered that on this 27th of *June*, 1850, the

plaintiff filed in my office the following account as a cause of action, to-wit:

"*Moses Usher to James M. Cornwell, Dr. To three months' work at ten dollars per month, \$30.00. June 27th, 1850. James M. Cornwell.*"

Nov. Term,
1851.

USHER
v.
CORNWELL.

Whereupon a summons issued made returnable on the 2d of *July*, 1850, at ten o'clock, A. M., and one subpoena for plaintiff's witnesses. Summons returned indorsed served 28th *June*, 1850, by copy; also subpoena returned served. The parties appeared; and the cause being called, the witnesses sworn and examined, and all things touching the same fully heard, it is considered that the plaintiff recover of the defendant the sum of 26 dollars and 90 cents damages, and 3 dollars and 36 cents costs, with interest till paid, and the defendant in mercy, &c. Given under my hand and seal this 2d of *July*, 1850
Wesley Davis, J. P., [seal].

This transcript, duly certified, was filed in the clerk's office on the 17th of *July*, 1850. At the next ensuing term of the Circuit Court, to-wit, in *September*, 1850, the parties appeared, and the defendant moved the Court to dismiss the cause.

The grounds of the motion were, that the plaintiff was an infant; that no *prochein amy* had been appointed for him by the justice; and that no person had consented in writing to act as *prochein amy* for the plaintiff.

It was shown that the plaintiff was an infant; that, on the day the summons of the justice issued, *George H. Cornwell* filed with the justice his written acknowledgment as security for costs; and that the summons required the defendant to answer the plaintiff, by his next friend *George H. Cornwell*, of a plea, &c.

The motion was overruled.

The cause was afterwards tried by the Court, and judgment rendered for the plaintiff for 26 dollars and 90 cents, with costs.

The overruling of the motion to dismiss the suit is the only error assigned.

We think that the naming of a person as *prochein amy*,

Nov. Term, 1851. by the justice, in the summons, may be considered as an appointment of such person as *prochein amy*.

USHER
v.
CORNWELL.

We have further to inquire whether the fact that the *prochein amy* had not, in terms, consented in writing to his appointment, required the Circuit Court to dismiss the suit.

The statute says that, whenever requested, the justice shall appoint some suitable person, who will consent thereto in writing, to be named by such [infant] plaintiff, to act as his next friend in such suit, who shall be responsible for the costs therein. R. S. p. 869.

In this case, the *prochein amy* agreed in writing to be responsible for the costs ; but the defendant says that such agreement is not a written consent to his appointment.

This is, certainly, a very technical objection, and one which, at all events, does not show the summons to be a nullity. The omission of the written consent in question, was, at most, but a mere irregularity, which the defendant might subsequently waive, or take advantage of, as he should think proper. If, however, he wished to object to the irregularity, he should have made the objection in the first instance. Here, the defendant appeared to the suit before the justice, went to trial on the merits, and suffered judgment to be rendered against him, without making the objection. The Circuit Court were not informed, by affidavit or otherwise, that the defendant did not know of the omission complained of, whilst the suit was pending before the justice. The Circuit Court, under these circumstances, were justified in refusing to dismiss the suit. The objection, if otherwise available, was made too late. It had been waived by the proceedings before the justice.

Per Curiam.—The judgment is affirmed, with 5 *per cent.* damages and costs.

J. P. Usher, for the plaintiff.

J. Cowgill, for the defendant.

CARTER v. THOMAS.

Nov. Term,
1851.CARTER
v.
THOMAS.

Where the declaration consists of a special and a common count, and the evidence received at the trial is admissible under the common count, the judgment for the plaintiff will not be reversed because the special count is bad.

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Where the general issue and special pleas are filed to the action, and the defense set up in the special pleas is admissible under the general issue, the judgment for the plaintiff will not be reversed because a demurrer to the special pleas was erroneously sustained, if no injury appears to have been done.

If an administrator undertakes, in writing, to pay a debt of the intestate when assets shall come to his hands, he may be sued on the undertaking, after the receipt of such assets, in his individual capacity, and the judgment against him will be *de bonis propriis*.

ERROR to the Cass Circuit Court.

Saturday,
December 6.

PERKINS, J.—This was an action of assumpsit by *Susan Thomas*, administratrix upon the estate of *Henry Thomas*, deceased, against *Chauncey Carter*, in his individual capacity, upon the following instrument:

"*Spear S. Tipton, Chauncey Carter, and Jordan Vigus*, administrators of *John Tipton*, deceased, will please pay *Henry Thomas*, or order, 88 dollars and 50 cents, and oblige yours, &c., *H. B. McKeen*. January 21, 1843."

The acceptances on said order were as follows:

"Accepted, as administrator, 4th February, 1843. *S. S. Tipton*."

"Accepted, to be paid when funds are received for the estate. *C. Carter*, administrator."

The declaration contained also the common counts.

Carter pleaded the general issue and several special pleas. The special pleas were all held bad on demurrer. There was a trial upon the general issue, and judgment against the defendant *de bonis propriis*.

The evidence given upon the trial was: 1. The order and acceptances above set out, the different signatures having been proved; 2. Proof that funds to the amount of 300 dollars, belonging to said estate, had, subsequently to said acceptance, come to the hands of said *Carter*; that on the 1st day of August, 1850, payment of said ac-

Nov. Term,
1851.

CARTER
v.
THOMAS.

ceptance was demanded of him and refused; that the plaintiff was administratrix on the estate of *Henry Thomas*, deceased; that *Carter* had resigned as administrator before the commencement of this suit; and that *John S. Patterson* and *George T. Tipton* were administrators *de bonis non* upon said estate. This was all the evidence, and was offered under the common counts. Upon it, the Court, trying the cause instead of a jury, found for the plaintiff 128 dollars, and gave judgment accordingly.

It is objected to this judgment that the declaration is bad, that the special pleas were good, and that the judgment, if for the plaintiff at all, should have been against the defendant *de bonis intestati*, and not *de bonis propriis*.

As to the first objection, supposing the first count of the declaration bad, the common counts are sufficient to support the judgment, and the evidence was offered under them, as well as under the special count. As to the second objection, the defenses set up in the special pleas were all admissible under the general issue, and, hence, no injury, so far as appears, was done by the decision on the demurrer to said pleas (1). Upon the third point, the judgment, if against the defendant at all, was necessarily against him *de bonis propriis*, as he was declared against in his individual capacity; and, we think, upon the evidence, the judgment was rightly rendered against him. It seems that "if an executor or administrator promises, in writing, that in consideration of having assets, he will pay a particular debt of the testator or intestate, he may be sued on his promise in his individual capacity, and the judgment against him will be *de bonis propriis*." 2 Williams on Ex. 1267. See, also, *Jennings v. Newman*, 4 T. R. 347.—*De Valengin v. Duffy*, 14 Peters, 282.—*Mills v. Kuykendall*, 2 Blackf. 47.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

L. Barbour and *A. G. Porter*, for the plaintiff.

D. D. Pratt, for the defendant.

(1) See *Darter v. The State*, 5 Blackf. 61.—*Shanklin v. Cooper*, 8 Blackf. 41.

STOCKWELL and Another v. WALKER and Others.

Nov. Term,
1851.STOCKWELL
v.
WALKER.

The revival of a judgment against the principal, by a *scire facias* issued against him alone, does not release the replevin-bail.

APPEAL from the *Tippecanoe* Circuit Court.

Saturday,
December 6.

PERKINS, J.—Motion to vacate the levy of an execution.

The motion was grounded upon the following facts:

On the 22d day of *August*, 1839, *John W. Keirle* recovered a judgment in the *Tippecanoe* Circuit Court, against *David Patton*, for over 800 dollars, and, on the 18th day of *November* of that year, *Elias L. Beard* became replevin-bail upon said judgment. In *February*, 1845, *John W. Walker*, as administrator upon the estate of said *Keirle*, who had deceased, obtained a judgment of revivor of said judgment against *Patton*, in proceedings instituted against him alone. Afterwards, in 1849, said *Walker*, as administrator as aforesaid, caused a *scire facias* to be issued on said judgment in favor of *Keirle* of the 22d of *August*, 1839, against *Patton*, the judgment-debtor, and *Beard*, the replevin-bail, and obtained judgment of revivor against them jointly, no defense being made. Afterwards, in 1850, *Walker* caused an execution to issue, on this last judgment, against *Patton* and *Beard*, which execution, the sheriff of *Tippecanoe* county, Mr. *Winton*, levied upon certain property as the property of said *Beard*. The property thus levied upon, the plaintiffs in this motion claim to own by a title derived through *Beard*.

The defendants to the motion appeared and confessed the truth of the allegations upon which it rested, and the parties stipulated as follows:

"It is agreed that the judge, on the hearing of said motion, decide upon the following point raised by it, and none other, to-wit: Did the revivor of said judgment against *Patton* alone, release *Beard*, his replevin-bail? If, in the opinion of the judge, it did release *Beard*, then said levy is to be vacated; otherwise, said levy is not to be vacated."

Nov. Term,
1851.

HENRY
v.
STATE BANK
OF INDIANA.

The Court below held that *Beard* was not released, and dismissed the motion.

A judgment for the plaintiff in an action upon a domestic judgment, is not a satisfaction of the judgment sued on, for it is not payment of it, nor a merger of it. The first and second judgments in such case are but securities of the same degree for the same debt. It would seem to follow, therefore, that both securities must remain in force; and to this effect are the authorities. *Jackson v. Shaffer*, 11 John. 513.—*Andrews v. Smith*, 9 Wend. 53. And see Wright's Ohio R. 46. The first judgment, then, not being extinguished by the second, the parties to it, as principal and bail, must remain bound and liable to proceedings to enforce its collection. The proceeding against the principal alone in the first instance, could not prejudice, and should not be a source of complaint to, the bail.

Per Curiam.—The judgment is affirmed with costs.

J. Pettit and *S. A. Huff*, for the appellants.

D. Mace, for the appellees.

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HENRY v. THE STATE BANK OF INDIANA.

After the jury has been impaneled and the evidence heard, the plaintiff may, under the R. S. 1843, amend his writ and declaration by striking therefrom the names of any number of the defendants.

The notice of the protest for non-payment of a note payable at the branch at *Lawrenceburgh* of the state bank, stated that the note was presented, &c., "in the bank," for payment, &c. Held, that the words imported that the note was presented within banking hours.

The holder of a note payable at a chartered bank within this state, may, upon the note being protested for non-payment, notify all, or any part, of the indorsers of the fact, and render the indorsers thus notified liable for the payment of the note.

An indorser who has received due notice of the protest for non-payment of such a note, held by a bank, will not be discharged because a prior indorser was not thus notified, notwithstanding it was a usage of the bank to notify all indorsers of paper not paid at maturity, of protest.

ERROR to the Dearborn Circuit Court.

PERKINS, J.—*The State Bank of Indiana*, for the use of the branch at *Lawrenceburgh*, brought a joint action of assumpsit against *William V. Cheek* and five others, (among whom was *Aaron B. Henry*, the defendant,) the maker and indorsers of a promissory note. The defendants appeared and pleaded the general issue. A jury was impaneled and the evidence heard. Thereupon the plaintiff asked leave to amend by striking from the writ and declaration the names of all the defendants except *Henry*. Leave was granted; the amendment made; and, on motion, the jury was discharged and the cause continued to the next term at the plaintiff's cost. At that term, the cause was tried by a jury and the bank obtained judgment. A new trial was denied. The evidence is upon the record. The following is a copy of the note in suit:

"\$300. *Lawrenceburgh*, March 15, 1849. Ninety days after date, I promise to pay to the order of *Edmund C. Cheek*, the sum of three hundred dollars, negotiable and payable at the *Lawrenceburgh* branch of the state bank of *Indiana*, for value received, without any relief whatever from valuation or appraisement laws. *Wm. V. Cheek*." Indorsed, "*Edmund C. Cheek, John F. Cheek, Simeon Vinson, A. B. Henry, William Huff*."

The demand of payment of the note and the protest for non-payment were duly proved. It was shown that a notice, containing the following statement, was given, on the day of protest, to the defendant, *Henry*, in person, and forwarded by mail to the several indorsers. "Please take notice that a note for 300 dollars, drawn by *Wm. V. Cheek* in favor of *Edmund C. Cheek*, or order, dated *Lawrenceburgh*, 15th day of *March*, 1849, payable ninety days after date, at the *Lawrenceburgh* branch of the state bank of *Indiana*, indorsed by you, was this day presented for payment in said branch, and by the undersigned, notary public, protested for non-payment. The holder thereof looks to you for payment." Signed by the notary.

The notice to *Vinson* was directed to *Wilmington, Dear-*

Nov. Term,
1851.
HENRY
v.
STATE BANK
OF INDIANA.
Saturday,
December 6.

Nov. Term,
1851.

HENRY
v.
STATE BANK
OF INDIANA.

born county, Indiana. It was proved that the notary inquired at the bank as to the direction of this notice, and was instructed to give it as he did. It was shown that *Vinson* resided, at the time, and had for from five to seven years previously, from five to seven miles from *Wilmington*, and within from one to two miles of another post-office called *Dillsboro*, whither he had removed from *Wilmington*, and at which place he received, sometimes, if not uniformly, his letters and papers; that he had been an indorser of notes in said bank for six years or more; that the bank understood his residence, when he commenced indorsing, to be at *Wilmington*; had never been informed that he had changed it; and had always had his notices of protest, of which there had been many, sent to the office at that place. The bank did not know that he received any of them, but the notes in reference to which the notices were sent, were renewed, the new notes being signed by him. It was proved that the bank was in the habit of having her notary notify all the indorsers on paper protested, and that this fact was generally known; but that this was done for the security of the bank, and not for the accommodation of the successive indorsers; "that when said bank received collections from abroad, it was her custom to hand such paper, when not paid, to a notary for protest, who inclosed all the notices to the different parties on such paper, in a notice to the bank or person sending such paper for collection; and when said plaintiff sent bills or notes to other banks abroad for collection, and they were protested, said plaintiff always received the notices to all parties inclosed under cover to said plaintiff, which, when received, were immediately forwarded by her to the several parties respectively." See as to this practice, *Bull v. Bank of Alabama*, 8 Ala. 590.—*Smith v. Roach*, 7 B. Mon. 17. Such was the evidence.

Objection is made—

1. To the permission given by the Court to amend in this case. The objection, we think, is answered by the case of *Taylor v. Jones*, 1 Carter's Ind. R. 17.

2. The judgment for costs in the final judgment is complained of. It is contended that the costs of the cause up to, and at, the continuance on account of the amendment, may be embraced in it; but there is no taxation of costs, either upon the continuance, or at the final judgment, on record, and hence we cannot say that any injury has been, or will be, done to the defendant below.

3. It is insisted that the notice of protest was insufficient, because it did not expressly state that the demand of payment was made "within or at the close of banking hours," on the day, &c.; but we think the notice was sufficient. It stated that the note was presented on the day, &c., "in said bank," for payment, &c. The reasonable import of the words used is, that the note was presented within banking hours and before the closing of the bank. See, on this point, Story on Bills, s. 390, and note.—Smith's Mer. L., p. 247, and note.

4. The fourth ground taken for the reversal of the judgment is, that the bank, by negligence, lost her remedy against the defendant below, *Henry*. It is not claimed that the bank was guilty of *laches* towards him directly, but indirectly, through negligence towards his immediate indorser. The argument is this: It is insisted that the custom of the bank, as testified to in this case, of notifying all the indorsers upon paper, had become the law of the bank, which the institution was bound to follow in every case; that that custom was not followed in this case—the notice to *Vinson* not being a legal one, as it was not sent to the post-office nearest his residence; that, consequently, he was discharged, by the negligence of the bank, from liability on the note, and, being the immediate indorser of the defendant, *Henry*, that discharge operated to his prejudice; from all which, the conclusion is drawn that *Henry* himself should be discharged from liability to the bank.

The custom of a bank, variant from the general rule of law upon the point, may become the law of the bank, as between the institution and its debtors, on the ground that contracts with it are supposed to be made by the parties

Nov. Term,
1851.

HENRY
v.
STATE BANK
OF INDIANA:

Nov. Term,
1851.

HENRY
v.
STATE BANK
OF INDIANA.

with reference to such custom. For example, if it is the uniform and known practice of a bank to allow four days of grace instead of three, the bank will be bound by that practice in a case where there is no express stipulation. *Maine Bank v. Smith*, 18 Me. R. 99. But, according to the general principles of commercial law, the bank, as the holder of this note, had a right to notify all the indorsers, and hold all of them, or any part of them she chose, liable to herself upon it; and had she notified them all and sued but her immediate indorser, the notice would have inured to the benefit of that indorser as against the prior ones. Or the bank had a right to single out any one indorser, notify and hold him alone liable to herself, and leave him to notify his prior indorsers and thus secure their liability over to himself; the indorsers subsequent to the one notified by the bank, being, of course, discharged. The bank was not bound to notify any indorser she did not attempt to hold liable; and it was the duty of every indorser notified to see to it immediately that indorsers prior to him were notified, for his own security. The bank thus having, by law, the right of pursuing either of two courses, we do not think the adoption of one or the other for any given time, should be regarded as the establishing of a custom precluding her from exercising the remaining one whenever she might choose. To so hold would, in fact, be abrogating a part of the law itself. The bank, in this case, was acting under a general principle of law and not adopting a custom aside from the law. *Chitty*, in his work on Bills, p. 530, 8th Ed., says: "It was once thought that notice of non-acceptance must, in all cases, be given to the *drawer* of the bill, and demand of payment made of him, or that, in default thereof, the indorsers would be discharged, notwithstanding they had regular notice, because, for want of notice to the drawer, the indorsers were without remedy against him, after they had successively taken up the bill. This opinion, however, so far as it related to *foreign bills*, was overruled in the case of *Bromley v. Frazier*, 1 Stra. 441, and in its relation to *inland bills*, in the case of *Heylyn et al.*

v. *Adamson*, 2 Burr. 669, and as to checks on bankers, in *Rickford v. Ridge*, 2 Camp. 537, on the principle, that to require a demand of the drawer or prior indorser, would be laying such a clog upon bills, as would deter every person from taking them; besides, the acceptor is primarily liable, and as the act of indorsing a bill is equivalent to making a new bill, every indorser thereby separately undertakes, as well as the drawer, that the drawee shall honor the bill, and the holder may consequently immediately resort to him without calling on any of the other parties; and it is the business of the indorser, as soon as he has received notice *himself*, to forward the like notice to the drawer, and all persons to whom he means to resort. See *Edwards v. Dick*, 4 Barn. and Ald. 212. However, it is admissible for the holder to give notice to *every* party as soon as he can ascertain his residence, for otherwise he will be without remedy, unless some other party to the bill has given him notice, in which case such notice may inure to his use." Story on Bills, s. 381.

The view we have taken of the particular point now under examination, settles the question raised, to-wit: whether *Henry* has been discharged by the act of the bank, and determines his liability, irrespective of the validity of the notice to *Vinson*, and we do not think, therefore, that we are required, even under our present constitution, to volunteer an opinion as to that. What we have said also answers the objections made to the instructions given, and renders it unnecessary that we should further extend this opinion.

Per Curiam.—The judgment is affirmed, with 1 *per cent*: damages and costs.

A. Brower, for the plaintiff.

P. L. Spooner, for the defendant.

Nov. Term,
1851.

HENRY
v.
STATE BANK
OF INDIANA.

Nov. Term,
1851.

WILLIAMS
v.
WILLIAMS.

WILLIAMS, Executor, v. WILLIAMS.

A. purchased of B., in 1838, a tract of land, paid a part of the purchase-money in hand, and was to pay the residue by discharging an outstanding note of B. to a third person, when A. should sell the land. A. sold the land, omitted to pay the note, and concealed from B., who had removed to another state, the fact of the non-payment, and suppressed information thereof. Judgment having been recovered against B. upon the note, he brought this suit, in 1849, against A.'s executor, upon the following common counts: 1. For money had and received by the testator, &c.; 2. For land bargained and sold to the testator, &c.; 3. For interest for the forbearance of moneys loaned to the testator, &c.; and 4. Upon an account stated. The facts above recited were the substance of the evidence. *Held*, that there was no proof of any of the causes of action alleged in the declaration. *Held*, also, that the non payment of the note could not properly be proved under any of the counts.

Saturday,
December 6.

ERROR to the *Morgan* Circuit Court.

PERKINS, J.—Assumpsit. The declaration is as follows:

"*John R. Williams* complains of *William Williams*, executor of the last will and testament of *William Williams*, deceased, late, &c., in a plea of assumpsit: For that the said *William Williams*, deceased, in his life time, heretofore, to-wit, on the first day of *May*, 1844, at the county aforesaid, was indebted to the plaintiff in the sum of 200 dollars for money had and received by him, the said *Williams*, deceased, for the use of the plaintiff; and in the further sum of 200 dollars for land bargained and sold by the plaintiff to said *Williams*, deceased, in his life time, at his request; and in the further sum of 200 dollars for interest for the forbearance," &c.; "and in the further sum of 200 dollars upon an account stated," &c. "And being so indebted," &c. The declaration concludes in the usual form.

The defendant pleaded, 1. Non assumpsit by the said *Williams*, deceased; and 2. Non assumpsit by him within six years, &c.

Replication to the second plea, that the said *William Williams*, deceased, in his lifetime, concealed the cause of action from the knowledge of the plaintiff, until within less than six years, &c.

Rejoinder, that the said *William Williams*, in his lifetime, did not conceal the cause of action, &c.

NOV. TERM,
1851.

The cause was submitted to the Court for trial, and the following evidence was adduced:

WILLIAMS
V.
WILLIAMS.

Mrs. *Garrison* testified, that in the fall of 1844, the deceased, *William Williams*, was at her residence in *Iowa*; and in reply to a question of hers, he stated that *John R. Williams* had sold his place, being the south-east quarter, &c., to him; that he had paid him 200 dollars, and 10 dollars to *Sims*, and was to pay the balance of what the land brought when he sold it, on *John R. Williams's* sale-note; that he had sold the land to *William Percy* for 250 dollars. Witness understood the sale-note was given for a horse-beast, and that *Lewis Williams* was security on it. Witness states, that in the following year, in the fall of 1845, she was at the residence of the deceased, *William Williams*, in *Morgan county, Indiana*, and *Lewis Williams* asked her to carry a letter to *John R. Williams*, urging him to pay off said sale-note, but said *William Williams* told her not to take the letter, or if she did, not to deliver it, as he was to pay off said note; and also stated that he had carried a letter for *Lewis* on the same subject, when he went to *Iowa*, the year before, but did not deliver it to *John*, because he was himself to pay off the note.

Mr. *Davee* testified to the sale of the farm by *John R. Williams* to *William Williams*, deceased, for 250 dollars; to said *Williams's* admission that he was to pay said sale-note as a part of the purchase-money; and to the amount of said sale-note.

Mr. *Stafford* testified to the amount of the sale-note, 62 dollars and 50 cents, and that it was given for the price of a horse purchased by *John R. Williams* at the sale of the goods, &c., of *Margaret Williams*.

It was also proved that a suit had been instituted, and a judgment obtained, by the payee of said note, against said *John R. Williams*, which judgment does not appear to have been paid; that *John R. Williams* conveyed the farm to *William Williams*, and receipted him in full for the purchase-money, in 1838; that *William Williams* con-

Nov. Term,
1851.

WILLIAMS
v.
WILLIAMS.

veyed to *Pearcy* in 1841, and that *John R. Williams*, since the sale of his farm, had resided in *Iowa*. This suit was commenced in *February*, 1849.

Upon this evidence the Court below gave judgment for the plaintiff.

Two questions present themselves for our consideration: 1. Are any of the causes of action named in the declaration proved to have existed? 2. Is there proof of a concealment of them?

There is no proof of the count for money had and received. When *William Williams* received payment for the farm, on its sale by him, he received it as his own money and to his own use. He did not agree to apply any part of the price of that farm to the use of *John R. Williams*. But if he did, and received any part of that money to *John R.*'s use, and upon an agreement that it should go upon the note of the latter, still the fact of the reception was not concealed, and the statute is a bar. And if, as is contended, though the record does not show it, *William Williams* was the payee and holder of said sale-note, and received the money in question as payment of it, such payment should have been pleaded by *John R.* to the suit on said sale-note by said *Williams*, or his representative. There is no proof of an account stated.

There is proof of the sale of a farm by *John R. Williams* to *William Williams*, deceased, for 250 dollars; that 40 dollars of that sum was payable, upon a re-sale of the farm by *William Williams*, on a sale-note of said *John R. Williams*; that said farm had been re-sold, and, probably, the purchase-money received.

This part of the causes of action alleged in the declaration is proved to have existed in 1841, more than six years anterior to the commencement of this suit; and the next question is, was it concealed by *William Williams*, deceased?

We discover no evidence of such concealment. The only fact that he concealed, or attempted to conceal, from *John R. Williams*, was the non-payment of the sale-note.

The non-payment of that note is not, if it could have been, alleged as a cause of action in this suit. The facts, that he had re-sold the farm and received payment, were not concealed by *William Williams*; and these facts certainly cover all that is proved of the causes of action alleged in the declaration. We feel constrained to reverse the judgment below.

Nov. Term,
1851.

HARPER
v.
DOLF.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. L. Ketcham, for the plaintiff.

L. Barbour, for the defendant.

HARPER v. DOLF.

8 205
154 320

In an action of slander, where there is ambiguity in the words laid in the declaration, in regard to the person slandered, there must be an introductory averment showing that the plaintiff was the person aimed at.

To say of a man that he was seen ravishing a cow, imports that he was seen committing the crime of bestiality and buggery with the cow.

In the declaration in the present case, words alleged to have been spoken of the plaintiff were, that he had been seen a foul of a cow. *Held*, that they did not warrant an *innuendo* that he was guilty of bestiality. *Held*, also, that if the defendant had been in the practice, by the words laid, of imputing the crime of bestiality, or, if he had used them on the occasion alleged in that sense, and they were so understood by the hearers, there should have been a special averment to that effect.

Words charged to have been spoken by the defendant, were alleged in the declaration as follows: *R.* (meaning, &c.,) saw a young man (meaning the plaintiff) ravishing a cow. My son *R.*, (meaning, &c.,) on his way home to his father's, between *S.*'s shop and his father's, saw a man ravishing a cow, (meaning the plaintiff, &c.) *Held*, that the words did not show, with sufficient certainty, that the plaintiff was the person whom the defendant intended to slander.

The following words were alleged in the declaration to have been spoken by the defendant: *R.* (meaning, &c.,) saw him (meaning the plaintiff) ravishing, &c. *Held*, that the word *him* sufficiently demonstrated the person of the plaintiff. *Held*, also, that a formal *colloquium* stating that the words were spoken in a conversation of and concerning the plaintiff was unnecessary.

APPEAL from the *Parke* Circuit Court.

BLACKFORD, J.—This was an action for slanderous words,

Saturday,
December 6.

Nov. Term,
1851.

HARPER
V.
DELP.

alleged to have been spoken of the plaintiff, *William Harper*, by the defendant, *Jonas Delp*.

The declaration contains three counts, each of which was specially demurred to. The demurrers were sustained, and judgment rendered for the defendant.

The first count states that before and at the time of the committing of the grievances thereafter mentioned, the plaintiff resided in the neighborhood of the defendant, in *Sugar Creek* township, in the county of *Parke*, and was then and there a young man lately married, and had not by his wife any children; that the plaintiff was then and there the only young married man in the neighborhood of the plaintiff and defendant, in said township, who had no children after marriage; that one *Andrew Scott*, then and there, had a blacksmith-shop between the defendant's house and the house of one *Sarah Clove*, of said township; that a person in traveling from said *Clove's* house to that of the defendant, by the way of said shop, so as to leave the house of one *Martin Harper*, the plaintiff's father, to the right, would pass by and near to the plaintiff's house, which would be the first house on said route after passing said shop; and that the plaintiff was, for a long time before, to-wit, for the space of six months, and at the time of the committing of the grievances thereafter mentioned, the only young married man without children by his marriage, who lived in the neighborhood of said shop, and whose house would be on the route from said *Clove's* house to the house of the defendant, between said shop and the house of one *John Summers*, who also then and there resided upon said route.

This count further states that the defendant, well knowing the premises, but contriving and maliciously intending to injure the plaintiff, and to cause it to be suspected and believed that he had been guilty of bestiality and buggery, as thereafter stated to have been imputed to him by the defendant, theretofore, to-wit, on, &c., at, &c., in a certain discourse which he, the defendant, then and there had of and concerning the plaintiff, of and concerning the crime of bestiality and buggery, and of and con-

earning the time when, and place where, and person by whom, the said crime was alleged to have been committed, in the presence and hearing of one *David Allen* and others, then and there, in the presence and hearing of those persons, falsely and maliciously spoke and published of and concerning the plaintiff, of and concerning the crime of bestiality and buggery, and of the time when, and place where, he alleged the same to have been committed, the false, scandalous, malicious, and defamatory words following, that is to say :

Nov. Term,
1851.

HARPER
v.
DELP.

" That his son *Rial* (meaning *Erial Delp*, the defendant's son), on the week before, had staid at *Sarah Clove's*, (meaning the *Sarah* before mentioned,) and on the way home (meaning on the way from the house of said *Sarah Clove* to the house of the defendant), he (meaning said *Erial*) saw a young man a ravishing a cow. He (meaning said *Erial*) went by *Scott's* shop, and left *Martin Harper's* farm on the right, (meaning thereby that said *Erial*, in going from said *Sarah's* as aforesaid to the defendant's house, had gone by said blacksmith-shop of said *Scott*, and had left the residence of said *Martin Harper*, the plaintiff's father, on his, said *Erial's*, right); and that between the shop and *John Summers's* the act took place, (meaning thereby that the crime of bestiality and buggery with a cow, had been committed between said blacksmith-shop and the residence of said *John Summers*); that this was a young married man, and his wife had no children, and not like for any; and that it was so early in the morning that a person could not have got far from home." Thereby, then and there, meaning that the plaintiff had been and was guilty of the crime of bestiality and buggery with a cow.

This first count further states that the defendant, by the speaking and publishing of said words, intended to charge, and did charge, the plaintiff with the crime of bestiality and buggery with a cow; that the defendant designed to give, and did give, by said words, such a description of the plaintiff, the place where he lived, &c., as to inform the persons to whom he was speaking as aforesaid, that

Nov. Term,
1851.

HARPER
v.
DELP.

he was then and there speaking of and concerning the plaintiff; and that said persons to whom said words were spoken and published as aforesaid, did, by said words, understand the defendant to be speaking and publishing said words of and concerning the plaintiff, and to charge the plaintiff with the crime of bestiality and buggery with a cow, and to have been seen at the act by *Erial Delp*, the defendant's son.

By means whereof, the plaintiff has been greatly injured, &c.

The first cause of demurrer to the first count, is as follows: It is not averred that the words were spoken of and concerning the plaintiff.

The answer to this objection is, that there is such an averment. The count states that the defendant, well knowing the premises, &c., theretofore, &c., in a certain discourse which he then and there had of and concerning the plaintiff, &c., in the presence and hearing of one *David Allen* and others, then and there, in the presence and hearing of those persons, falsely and maliciously spoke and published of and concerning the plaintiff, &c., the false, scandalous, malicious, and defamatory words following, &c. That is as express an averment on the subject as could be made.

The second cause of demurrer is as to the sufficiency of the *colloquium*.

It was, no doubt, necessary that the count should show that the words were applicable to the plaintiff. It was for that purpose alone, that the inducement was inserted. If the words are here shown to be so applicable, then this part of the declaration is unobjectionable. In ordinary cases, it is sufficient on this subject to aver that the words were spoken of and concerning the plaintiff. But we understand the rule to be, where, as in the case before us, there is an ambiguity in the words laid, in regard to the person slandered, there must be an introductory averment showing that the plaintiff was the person aimed at. The following cases will illustrate this rule. In a very early case it was said: "If one saith the parson of *Dale* hath

committed such a robbery, an action upon the case for these words well lieth, if he aver in his declaration that he was the parson of *Dale* when the words were spoken." Per *Doddridge*, Justice, in *Lewis v. Walter*, 3 Bulstrode's Rep. 225. There is another case as follows: Action for words. Whereas the defendant's wife having communication with *J. S.*, of the plaintiff, and intending to deprive him of his good name and fame, and draw him into peril of his life, such a day and year spoke of the plaintiff these words: "Go tell my landlord (*innuendo* the plaintiff) he is a thief, and I will cause him (*innuendo* the plaintiff) to be hanged." Verdict for the plaintiff, and motion in arrest of judgment. The question was, whether the declaration should not have averred that the plaintiff was the defendant's landlord. The judges were, at first, equally divided on the point; but they finally advised the plaintiff to relinquish that action, and amend this fault in the second one. Ordered accordingly. *Spencer v. Medburne et ux.*, Cro. Charles, 420. We will refer to one other case. The words there were: "Your master and dame stole rugs and quilts." A suit was brought by the master; and the declaration is set out in the report of the case. The only allegations in the declaration, to show that the plaintiff was the person intended, are, that the words were spoken of the plaintiff, and that the person to whom they were spoken was, at the time, the plaintiff's servant. The declaration was objected to on the ground that it did not show that the person addressed was the plaintiff's servant at the time of the discourse. The Court, however, thought that that fact was shown, and overruled the objection. *Upton v. Pinfold et ux.*, Comyn's R. 267.

In the count now under consideration, there is a *colloquium* of the plaintiff, and an averment that the words were spoken and published of him. There is, also, a prefatory averment descriptive of the plaintiff. The words alleged to have been spoken say, that the guilty person resided not far from the place where the offense was committed, and they describe that place. The words also say, that the guilty person was a young married man

-Nov. Term,
1851.

HARPER
v.
DELF.

Nov. Term,
1851.

HARPER
v.
DELF.

whose wife had no children. It appears, by the prefatory averment, that at the time the words were spoken, the plaintiff lived in the neighborhood of the place where the words say the offense was committed; that he was, at the same time, a young married man whose wife had no children; and that there was no other young married man in that neighborhood whose wife had no children. We are satisfied, upon comparing these descriptions, that the declaration shows that the words laid were spoken of and concerning the plaintiff. This point could not have been made clearer by any difference in the form of the *colloquium*. There is no ground, therefore, for the second cause of demurrer.

The third cause of demurrer to the first count is, that the following *innuendo*, to-wit, "thereby then and there meaning that the plaintiff had been and was guilty of the crime of bestiality and buggery with a cow," is not warranted by the precedent matter. The words alleged in the first count to have been spoken of the plaintiff are, that he had been seen ravishing a cow.

The defendant contends that the words, ravishing a cow, do not ordinarily mean the having of sexual or carnal knowledge of her; but we are of a different opinion. The first definition given in *Johnson's Dictionary* of the word ravish, as a verb, is, "to constuprate by force; to deflour by violence;" and the definition given of the word constuprate is, "to violate, to debauch, to defile." In *Webster's Dictionary*, one of the definitions of the word ravishing is, "compelling to submit to carnal intercourse." The word ravish has, no doubt, other significations; but when used in the connection it here is—when it is said that a man was seen ravishing a cow—we must consider the natural meaning of the words to be, that the person so seen was committing the crime of bestiality and buggery with the cow.

The second count is very similar to the first, and is unobjectionable.

The third count commences as follows: And afterwards, to-wit, on, &c., at, &c., in a certain other discourse which

the defendant then and there had, in the presence and hearing of divers other good and worthy citizens of said state, the defendant further contriving and intending as aforesaid, then and there, in the presence and hearing of said citizens, falsely and maliciously spoke and published, of and concerning the plaintiff, the false, slanderous, malicious, and defamatory words following, that is to say, &c. This count here sets out various sets of words, to all of which there is appended the following *innuendo*, to-wit, "meaning that the plaintiff was then and there guilty of the crime of bestiality." This count contains no introductory averment; nor does it state that the words were spoken *in a discourse* of and concerning the plaintiff.

The causes of demurrer are, 1. There is no allegation that the words were spoken of and concerning the plaintiff; 2. There is no special inducement or *colloquium* to support the *innuendoes*.

We have, for convenience, arranged the sets of words in this third count into classes.

The following are in the first class, namely: He (meaning the plaintiff) was seen a foul of a cow. *Rial* (meaning, &c.,) saw him (meaning the plaintiff) a foul of a cow. *Rial* (meaning, &c.,) that morning caught him (meaning the plaintiff) a foul of a brute. *Harper* (the plaintiff meaning) was caught by my son *Rial* a foul of a brute.

We do not think that any of the sets of words just named are actionable in themselves. The statement that the plaintiff had been caught a foul of a cow, does not warrant the *innuendo* that he was guilty of the crime of bestiality. The most usual signification of the word foul, as an adjective, is, unclean, filthy, dirty. The phrase "to fall foul" is not an uncommon one. The definition of it, given in *Webster's Dictionary*, is, to rush on with haste, rough force, and unreasonable violence; to run against, as the ship fell foul of her consort. Dr. *Johnson* gives the following example—In his sallies, their men might fall foul of each other. If the defendant had been in the practice, by the words laid, to impute the crime of bestiality, or if he had used them, on this occasion, in

Nov. Term,
1851.

HARPER
v.
DELF.

Nov. Term,
1851.

HARPER
v.
DELF.

that sense, and they were so understood by the hearers, there should have been a special averment to that effect. *Angle v. Alexander*, 7 Bingh. 119.—*McGregor v. Gregory*, 11 Meeson and Welsby, 287.—*O'Brien v. Clement*, 16 Meeson and Welsby, 159.—*Hays v. Mitchell*, 7 Blackf. 117.

The following sets of words are in the second class: *Rial* (meaning, &c.,) saw a young man (meaning the plaintiff) ravishing a cow. My son *Rial* (meaning, &c.,) on his way home to his father's, between *Andrew Scott's* shop and his father's, saw a man ravishing a cow, (meaning the plaintiff, &c.).

These sets of words in the second class are objectionable, on the ground that none of them show, with sufficient certainty, that the plaintiff was the person whom the defendant intended to slander. The words, "a young man," and, "a man," which are the only words used to designate the person, do not point to the plaintiff more than to any other young man or man whatever. Whether this uncertainty could have been remedied by an averment, we need not stop to inquire.

The following sets of words are in the third class: *Rial* (meaning, &c.,) saw him (meaning the plaintiff) ravishing a cow. My son *Rial* (meaning, &c.,) saw him (meaning the plaintiff) ravishing a cow. *William Harper* (the plaintiff meaning) was caught by my son *Rial* in the act of ravishing a cow.

We have already, in speaking of the first count, expressed an opinion that words like those here laid are actionable. We must, however, notice the special causes of demurrer. The first, namely, that there is no allegation that the words were spoken of and concerning the plaintiff, is not warranted by the facts. The count does, in express terms, contain such an allegation.

The second cause of demurrer, namely, that there is no special inducement or *colloquium* to support the *innuendoes*, cannot be sustained. There is here no ambiguity as to the person of the plaintiff. The first set of words is, *Rial* (meaning, &c.,) saw *him* (meaning the plaintiff) ravishing, &c. The second set is substantially the same.

The word *him* sufficiently demonstrates the person. There is an old case on this subject as follows: Action for these words: He (*innuendo* the plaintiff) is not worthy, &c. Exception was taken that the *he* might be spoken of any other, and that the *innuendo* would not help it. But the Court held that the action well lay, for *hic* and *ille* make a demonstration what person he intended, and it is alleged that he spoke *de querente* those words. *Taylor v. How*, Croke's Eliz. 861. In the third set of words, the plaintiff's name is given. There being then no ambiguity as to the person slandered, and the words being actionable, no special inducement would be necessary. Nor was any *colloquium* of the plaintiff necessary; that is, the formal *colloquium* stating that the words were spoken in a conversation of and concerning the plaintiff. The averment, which is, also, frequently called a *colloquium*, to-wit, that the words were spoken of and concerning the plaintiff, is indispensable; and that, as we have already observed, is contained in this count. The language of Mr. *Starkie*, on this subject, is as follows: "Formerly it was the practice to aver, that the defendant spoke the words in a certain discourse which he had with others, or with the plaintiff himself in the presence of others, concerning the plaintiff. This was technically called laying a *colloquium*, and till the case of *Smith v. Ward*, Croke's James, 673, it seems to have been doubted whether a declaration without a *colloquium* would be good. In that case, it was alleged that the defendant said of the plaintiff, 'He (*innuendo* the plaintiff) is a thief;' and the Court, on being informed that it was the common course to declare that he said *de præfato querente hæc verba*, held it to be sufficient without a *colloquium*." 1 *Starkie on Slander*, 363, 364.

Per Curiam.—The judgment is reversed with costs. Cause remanded for further proceedings not inconsistent with this opinion.

J. A. Wright and *E. W. McGaughey*, for the appellant.

S. F. Maxwell, *T. H. Nelson*, and *J. P. Usher*, for the appellee.

Nov. Term,
1851.

HARPER
v.
DELP.

Nov. Term,
1851.

LARSH
v.
BROWN.

(1) The R. S. 1852 have enacted, that, "In an action for libel or slander, it shall be sufficient to state generally that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove, on the trial, the facts showing that the defamatory matter was published or spoken of him." R. S. 1852, vol. 2, p. 45. This statute is similar to that of *New York*. The statute of *New York* has been held to dispense with the allegation of extrinsic facts showing the application of the words to the plaintiff, but not to dispense with the necessity of an averment or innuendo, when it becomes essential to show the meaning of the words themselves. *Pike v. Van Wormer*, 5 Practice R. 171. When the meaning of the words is so ambiguous that extrinsic facts are necessary to be proved to show them to be actionable at all, the necessity of stating these facts by an explicit averment is precisely the same as it has always been. *Fry v. Bennett*, 1 Code Rep. N. S., 238. Even though it may be uncertain to whom the words were intended to apply, it is no longer necessary to insert in the complaint any averments [of extrinsic facts] showing that they were intended to apply to the plaintiff. But, in other respects, the same averments are requisite, in pleading under the code, as at common law. *Pike v. Wormer*, 6. Practice R. 99.

LARSH v. BROWN.

The answer put in to a bill requiring an answer without oath, cannot operate as evidence for the defendant.

Saturday,
December 6

ERROR to the *Union Circuit Court*.

BLACKFORD, J.—This was a bill in chancery filed by *Larsh* against *Brown*, in 1849.

The bill states that the parties had been in partnership in the business of milling; that the partnership was dissolved; and that a certain large sum was due from the defendant to the complainant on account of the partnership business. The bill prays that the defendant answer without oath, and make a full answer of all the partnership accounts.

The defendant answered the bill without oath. The answer admits that the partnership had existed, and had

been dissolved, as stated in the bill. But the answer denies that the defendant was indebted to the complainant on account of the partnership business. The answer contains accounts of the partnership business, and, according to those accounts, the complainant is largely indebted to the defendant.

Nov. Term,
1851.

LARSH
v.
BROWN.

Replication in denial of the plea.

The cause was tried by a jury. Verdict for the defendant for 50 dollars and 45 cents; and a final decree rendered against the complainant for that sum.

On the trial, the complainant asked the Court to charge the jury as follows:

1. The answer is no evidence of the partnership dealings, in order to have the same allowed.

2. The defendant's answer and his account stated are no evidence whatever of their truth; and said account and answer require the same proof as any other pleading which is denied, so far as the partnership is concerned.

These instructions were refused.

The defendant asked the Court to give the following instruction:

As the complainant has called on the defendant to state an account of the profits, his statement of it is evidence, and should be taken for true, unless it has been impeached and disproved by at least one witness, or circumstantial evidence.

This instruction, asked for by the defendant, was given.

The statute says, that where the bill prays that the defendant answer without oath, the answer shall operate only as a denial of the allegations and charges in the bill, and, in such cases, the complainant shall not be required to substantiate the allegations and charges in his bill by more than one witness. Acts of 1847, p. 60.

We think that, under that statute, the instruction asked by the complainant should have been given, and that asked by the defendant should have been refused. The answer put in to a bill requiring an answer without oath, cannot operate as evidence for the defendant.

Nov. Term,
1851.

THE CITY OF
MADISON
v.
ROSS.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

J. Perry and J. Yaryan, for the plaintiff.

J. S. Newman and J. S. Reid, for the defendant.

3c 236
106 23

THE CITY OF MADISON v. ROSS.

The corporate authorities of a city are not liable for an injury to private property caused by the erection, on a public street or road within the limits of the city, over a small stream, of a culvert and embankment which have proved insufficient to resist an extraordinary flood, if the culvert and embankment had proved sufficient for all purposes for about three years, and ordinarily careful and thoughtful men, and engineers of usual skill, would not have contemplated that such extraordinary flood would ever occur.

The degree of care and foresight which it is necessary to use in cases of this description, is that which a discreet and cautious man would or ought to use, if the risk and loss were to be exclusively his own; and it should be in proportion to the nature and magnitude of the injury likely to follow from its omission.

Saturday,
December 6.

ERROR to the *Jefferson* Circuit Court.

PERKINS, J.—Case by *Ross* against the city of *Madison*. The declaration alleged that the plaintiff, *Ross*, was the owner of a tan-yard, and that the city of *Madison* constructed a culvert and embankment across a small stream of water on *Second* street, in said city, so unskillfully that, by means thereof, said plaintiff's tan-yard was overflowed and destroyed. The city pleaded the general issue, and a special plea which need not be noticed. The issues were of fact. They were tried by a jury, and *Ross* obtained judgment. The evidence is not upon the record. The question in the case, for there is but one raised by counsel in this Court, arises upon instructions given and refused. The Court instructed the jury as follows:

"1. The city of *Madison* is liable for injuries done by her agents, as individuals are (1).

"2. If, in this case, the city, by her council, made an

appropriation of 50 dollars, and appointed *Marsh* and *Ford* to expend it in the erection of the culvert in question, and it was erected by *Dunlap* on a contract made by said *Marsh* and *Ford*, and paid for by the city, and it was erected negligently, carelessly, or unskillfully, so that it was thereby insufficient to pass off the water, and the plaintiff's tan-yard was overflowed, and he damaged thereby, the city of *Madison* is liable to said *Ross*.

"3. It is immaterial whether the contracts were made in writing or not, or whether the improvement was made on a street, or on the *Lawrenceburgh* road, if within the corporate limits of the city.

"4. The city of *Madison* is as much bound by the acts of *Marsh* and *Ford*, if they assumed to act as her agents, and after the acts were done she paid for them, and ratified them, as if she had at first ordered the improvement and made written contracts according to her charter and ordinance (2).

"5. If the jury find from the evidence that, owing to the negligent, careless, or unskillful manner in which the culvert in question was constructed, the tan-yard of the plaintiff was overflowed and he damaged, or the overflow and damage were thereby increased, the jury should find for the plaintiff.

"6. If the jury find that the flood of water which the plaintiff says injured his tan-yard, would have injured the tan-yard equally as much, if said culvert and improvement had not been made, the city is not liable."

The Court refused to give this instruction, the same being relevant:

"If the jury shall find that the damage complained of was occasioned by a flood of water so much more extraordinary than usual, that ordinarily careful and thoughtful men and ordinarily skillful engineers would not contemplate that such a flood would ever come, and said culvert and improvement did prove sufficient for all purposes for about three years, the jury should find the damage to have happened by what, in law, is called the act of God, and should find for the defendant."

Nov. Term,
1851.

THE CITY OF
MADISON
V.
ROSS.

Nov. Term,
1851.

THE CITY OF
MADISON
v.
ROSS.

The question raised is, as to the rule or principle by which the jury were to be governed in determining whether the culvert and embankment were, or were not, unskillfully constructed. Were they to regard them as unskillfully and negligently made, unless they were such as to withstand every possible force of the element; or should they regard them as skillfully done, if such as to withstand every probable force? On this point, the Court gave no direct instruction; but the inference to be drawn from those given, taking them all together, would rather be, that if the damage to the plaintiff happened in consequence of the improvement, the city was liable at all events. The defendant, however, if he asked it, had a right to a definite instruction touching this matter. He did ask one, and, if it expressed the law, or was within it, he was entitled to have it given to the jury. We think it was within the law and should have been given. In *The Mayor, &c., of New York, v. Bailey*, 2 Denio, 433, the chancellor has the following remarks, which are directly to the point, and, we think, entirely correct:

“The degree of care and foresight which it is necessary to use, in cases of this description, must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is to be anticipated and guarded against. And it should be that care and prudence which a discreet and cautious individual would or ought to use if the whole risk and loss were to be his own exclusively. Here the probable, if not the necessary, consequence of the carrying off of the city dam, by a flood, would be not only to sweep away the buildings and erections of all the owners of property upon the *Croton* below such dam, but also to endanger the lives of such owners and of their families. The dam should, therefore, have been constructed in such a manner as to resist such extraordinary floods as might have been reasonably expected occasionally to occur. And if the flood of 1841 was not much higher than any which had been known to occur upon this stream within the

memory of man, those who had charge of the construction of the dam should have anticipated such a flood; and should have provided a dam that would have been sufficient to resist the operation of that flood." "Although the flood of 1841 was not an ordinary one, I think the evidence of the plaintiffs was sufficient to authorize the jury to find that it was one of those occasional floods to which the *Croton* had sometimes been subject, and which should, therefore, have been provided against by those whose duty it was to guard against the probable consequence of such a flood. *C. Flemelling*, who lived upon the *Croton*, within two miles of the city dam, and was born there, testified that he had seen the river higher than in 1841, something more than twenty years previous to that time. He says nothing of the floods of 1837 and of 1839, as he was then in *Bedford*. But *Godney, Marshall*, and *Tompkins*, all of whom lived about two miles above the dam, thought, by the height of the water upon *Elbow* island, that the same was as high in the flood of 1837 as in that of 1841; and, *Frost* and *Bailey, jun.*, both testified that the floods of 1839 and of 1843, were nearly as great as in 1841. If the evidence given by these witnesses was to be credited, therefore, the flood of 1841 was an occurrence which ordinary care and prudence should have anticipated and guarded against."

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

S. C. Stevens, for the plaintiff.

J. G. Marshall and *J. Sullivan*, for the defendant.

(1) See *Ross v. The City of Madison*, 1 Carter's Ind. R. 281.—(2) 1d.

Nov. Term,
1851.

MICHIGAN
CENTRAL
RAILROAD
COMPANY
V.

NORTHERN
INDIANA
RAILROAD
COMPANY.

THE MICHIGAN CENTRAL RAILROAD COMPANY and Others v.
THE NORTHERN INDIANA RAILROAD COMPANY and Others.

An order of injunction granted by a circuit judge, in the vacation of the Court, is an interlocutory order of the Circuit Court, within the meaning of section 70 of chapter 37 of the R. S. 1843.

3c	239
170	582

Nov. Term,
1851.

MICHIGAN
CENTRAL
RAILROAD
COMPANY
v.
NORTHERN
INDIANA
RAILROAD
COMPANY.

From such an order an appeal lies, by virtue of said section, to the Supreme Court.

The appeal is required by the statute to be taken at the time when the order of injunction is granted.

The period of two days after the order of injunction was granted, was held, under the circumstances of the present case, to be at the time of granting the order, within the meaning of the statute.

The granting of an appeal in the vacation of the Circuit Court, without notice to the adverse party, from an order of injunction granted by the judge of the Circuit Court in vacation, does not deprive the appellee from being heard upon the sufficiency of the injunction-bond, or whether the appeal was granted in due time; but the want of a sufficient bond, or the fact that the appeal was not taken in due time, may be shown on a motion to dismiss the appeal.

The act of 1847, "to amend the provisions of the 37th chapter of the Revised Code," does not affect the right of the party aggrieved to appeal, at the time of making the order, from a judge's order of injunction granted in vacation.

Wednesday
December 10.

APPEAL from an order of injunction granted by the judge of the *Laporte* Circuit Court, at his chambers, in vacation.

SMITH, J.—Upon an application made to the president judge of the *Laporte* Circuit Court, at his chambers, in vacation, an injunction or restraining order was made by him on the 28th of *August*, 1851. The application was founded on a bill of complaint previously filed in the *Laporte* Circuit Court, and the injunction was granted in the absence of the opposite party, and without notice. Two days afterwards, on the 30th of *August*, an appeal to this Court, from the order granting the injunction, was prayed for, and was granted by the judge of the Circuit Court.

A motion is now made to dismiss the appeal, on the ground that the statute does not authorize an appeal to be taken from such an order during the vacation, or until the next term, of the proper Circuit Court.

The article relative to injunctions in the Revised Statutes, c. 46, p. 851, provides that the Circuit Court, in term, or the president judge alone, or the two associate judges together, in vacation, shall have power to grant injunctions or restraining orders, and to exercise all powers usual and necessary for Courts of chancery, in granting

or enforcing them. It is made unnecessary to issue a writ of injunction in any case, but instead thereof a copy of the order, duly certified by the clerk, is to be served upon the adverse party.

It is admitted, that previous to the Revised Statutes of 1843, there was no right of appeal given by statute, except from final judgments or decrees. The 70th section of chapter 37, R. S., p. 636, says: "Appeals to the Supreme Court shall be allowed to be taken from any interlocutory order or decree of any Circuit or Probate Court in this state, in any of the following cases." Among the cases here specified is this: "From any order or decree granting or dissolving an injunction." The 71st section is as follows: "No such appeal shall be granted by the Court from whose decision the same is prayed, unless such appeal is taken at the time when such order or decree is made, nor until a sufficient bond, as required in other cases of appeals, shall have been given by the appellant."

In 1847, an act was passed, the first section of which gives the right of appeal from any order or decree overruling any motion to dissolve an injunction, and the second section is as follows: "When any injunction shall be granted in vacation, an appeal may be taken to the Supreme Court at any time during the term of the Probate or Circuit Court next ensuing after the granting of any such injunction in vacation, subject to the provisions regulating appeals to the Supreme Court in other cases" (1).

The first question that suggests itself, in the consideration of the present motion, is, whether the order granting the injunction in this case, is, or is not, an interlocutory order of a Circuit Court, within the meaning of the 70th section of chapter 37 of the Revised Statutes. We think, though it was made by a judge of the *Laporte* Circuit Court in vacation, it is to be regarded as an order of that Court.

An injunction is defined to be a writ issuing by the order and under the seal of a Court of equity. Ed. on Inj. 9; Mitford, 124. The term is also indiscriminately ap-

Nov. Term,
1851.

MICHIGAN
CENTRAL
RAILROAD
COMPANY
v.
NORTHERN
INDIANA
RAILROAD
COMPANY.

Nov. Term,
1851.

MICHIGAN
CENTRAL
RAILROAD
COMPANY
V.
NORTHERN
INDIANA
RAILROAD
COMPANY.

plied to interlocutory orders in the nature of injunctions, though not enforced by means of the writ of injunction. Eden, 338. A president judge of a Circuit Court, sitting at his chambers to hear an application for an order of this kind, cannot be considered as holding a special or peculiar Court for that purpose, for he is only authorized to act in *vacation*, which signifies a period of time when *no Court* is sitting. Besides, the bill of complaint must be addressed to the Circuit Court, and the order, if made, becomes a part of the record of the cause pending in that Court, and is enforced by the authority of that Court.

The statute authorizing a single judge, in *vacation*, to make an interlocutory order which becomes the order of the Court, is quite consistent with the long established practice of both Courts of equity and of common law. An injunction may not only be granted in term, "but," says Mr. *Eden*, "in the *vacation*, *when the Court does not sit*, and no motion can consequently be made, a *judge* of a Court of equity will grant an injunction, upon petition, with affidavit and certificate of bill filed," &c. *Eden on Injunctions*, p. 377.

There are many interlocutory orders made by the judges of the *English Courts* of common law, in *vacation*, and when they could not be considered as constituting the Courts for which they assumed to act. Yet such orders seem always to have been considered orders of the Court, and the same effect is given to them as if they were made by the Court in term. In *Rex v. Wilkes*, 4 Burr. 2570, it was said, it had been the practice to grant such orders by a judge at chambers, time out of mind, and that they were as valid, if acquiesced in, as any act of the Court.

In the case of *Wood v. Plant*, 1 Taunt. 44, an interlocutory order had been made by one of the judges of the *King's Bench*, in *vacation*, changing the plaintiff's attorney, by substituting another in the place of the one who had commenced the suit. It appears that such a change could not be made without an order of the Court to that effect, and the suit having been prosecuted to judgment by the attorney so substituted, a writ of error was brought,

on the ground that the said attorney had no authority to act. The judgment was, however, affirmed. Lord *Mansfield* said: "What is the effect of the proceeding which is made the ground of the present exception? The Court orders Mr. *Mayhew*, at the request of the plaintiff, to be appointed his attorney in this cause. It is true, that the order is made by a judge at chambers; but still it is to be regarded as the order of the Court. The effect of these orders was much considered in the case of *The King v. Wilkes*, 4 Burr. 2570. They are as binding as any act of the Court, though they are not entered and made rules of Court, unless it be necessary to enforce them by attachment."

In the matter of *Taylor et al.*, 5 B. & Ald. 217, 7 Eng. C. L. R. 73, a motion was made for a rule to discharge a rule making a submission to arbitration a rule of Court. It was a submission to arbitration under the statute of 9 and 10 W. 3., c. 15. The submission was made a rule of Court, in vacation, and it was contended that, by the words of the statute, the submission could only be made a rule of Court by producing an affidavit of the execution of the agreement, and reading and filing it in Court. *Abbott*, C. J., in refusing the rule moved for, said: "If we were to grant the present application, we should do great mischief, inasmuch as the granting these rules, in vacation, is a practice attended with much convenience to the suitors of the Court. It seems to me that, by construing the statute with reference to the ordinary practice of the Court, we shall give fuller effect to the intention of the legislature. The statute makes it compulsory on the Court, on the affidavit being produced, to make the submission a rule of Court. It is, therefore, merely a matter of form to apply for the rule. No injury is done to the other party by granting the rule, for the award cannot be enforced until the next term. * * * If we were to overturn the practice in this case, we should establish a dangerous rule, for, by parity of reasoning, no consent-rule in ejectment, no rule for a special jury, or to pay money into Court, could be drawn up in vacation. The con-

Nov. Term,
1851.

MICHIGAN
CENTRAL
RAILROAD
COMPANY
V.
NORTHERN
INDIANA
RAILROAD
COMPANY.

Nov. Term,
1851.

MICHIGAN
CENTRAL
RAILROAD
COMPANY
v.

NORTHERN
INDIANA
RAILROAD
COMPANY.

sequence would be great delay in the administration of justice."

These cases, we think, abundantly establish the proposition, that an interlocutory order made by a judge in vacation, is to be regarded as the order of the Court for which the said judge is authorized by law to act; and from the whole tenor of the provisions of our statute on this subject, it would seem the legislature so understood the effect of such orders. Precisely the same effect is given to injunctions, whether granted by the Court in term, or by the judges in vacation; they are to be served in the same manner, and enforced by the same means; and they possess, in all respects, the same force and effect.

We are satisfied, therefore, that the order made in this case, is an order of the *Laporte* Circuit Court, from which an appeal lies under the 70th section of the statute before quoted.

The next question is, *when* may such an appeal be taken? The 71st section says: "No such appeal shall be granted by *the Court* from whose decision the same is prayed, unless such appeal is taken at the time when such order or decree is made," &c. From the use of the words, "the Court," in this section, the counsel for the appellees contend that the appeal can only be prayed for during a term of the Court. We do not think these words were used with the intention that they should have such a meaning.

The 70th section says, an appeal shall be allowed from *any* interlocutory order of the Court granting an injunction; but, according to the construction the appellees would have us give the 71st section, we should be obliged to determine that an appeal cannot be taken from *any* such order, but only from such as may have been made by the Court in term-time, for, from no other, could an appeal be prayed for at the time when made. This would not only be inconsistent with the literal meaning of the previous section, but would be doing violence to what we must suppose to be its spirit and intention. The mischief

under the law as it stood previously, was, that injunctions granted by the inferior Courts might be improvident and oppressive. The remedy here provided is an immediate appeal to a higher Court, and, certainly, it would be unreasonable to suppose that the legislature thought there would be less probability of improvident injunctions being granted by the president judge alone or by the two associates in vacation, than by the full Court in term.

The previous section having provided that appeals shall be allowed from the order of a judge in vacation, and this that the appeal must be granted at the time the order is made, both together necessarily imply that the judge acting for the Court in granting the injunction, shall also act for the Court in allowing the appeal; and as we have already seen that all orders legally made in a cause, whether by the Court in term, or by a judge in vacation, are regarded as the orders of "the Court," those words, in this section, refer as well to the granting of the appeal as to the previous order granting the injunction, and are of no greater or less signification as applied to the one act than to the other. The words "the Court" and "the judge," or "judges," are frequently used in our statutes as synonymous, and when used with reference to orders made by the Court or judges, they were, we think, intended to be so understood.

It is our duty to give full effect to both these sections of the statute, if that can be done, and there does not seem to be any difficulty in doing so, for we think it is evident that the office of the 71st section, is simply to impose certain conditions on those to whom the right of appeal is given by the preceding one, namely, to require them to signify their intention to appeal, in due time, and to give bond.

As in the case of *Taylor et al., supra*, the statute makes it compulsory on the Court to grant the appeal, on a sufficient bond being filed. In that case, as in this, it was contended that the words of the statute required the affidavit of the execution of the agreement to be read and filed in the Court in term, but it was held the statute was

Nov. Term
1851.

MICHIGAN
CENTRAL
RAILROAD
COMPANY
V.
NORTHERN
INDIANA
RAILROAD
COMPANY.

Nov. Term,
1851.

MICHIGAN
CENTRAL
RAILROAD
COMPANY
v.

NORTHERN
INDIANA
RAILROAD
COMPANY.

sufficiently complied with by the affidavit being filed, and the rule taken, in vacation. That case is here more directly in point than those cited by the counsel for the appellees from *Henning* and *Mumford*. In those cases, it was held that an appeal could not be taken in vacation from an injunction granted in term, because, under the statute of *Virginia*, such an appeal could not be taken as a matter of right, but only when the Court should, in its discretion, think an appeal necessary to prevent a change of property.

Among the reasons given for the decision in the case of *William and Mary's College v. Lee's Executors*, 2 Hen. & Mumf. 557, one was, that the adverse party was entitled to be heard on the question whether, in the proper exercise of the discretion of the Court, an appeal should be granted, and he could not be required to appear and show cause in vacation. A similar reason was given by this Court for refusing to hear the former motion of the appellees in this case, to have the *supersedeas* set aside; but it is not applicable to the case now before us, because our statute allowing an appeal from an interlocutory order, gives no such discretionary power to the Court making the order. The appeal may be demanded as a matter of right, on the filing of a bond in due time, and the granting of the appeal, like the taking of the rule in the case of *Taylor et al.*, is a merely formal matter.

The appellees, indeed, contend that they are entitled to be heard on the sufficiency of the bond, and upon its being filed in due time. But they are not deprived of that right by the granting of the appeal without notice to them. The want of a sufficient bond, or the fact that the appeal was not taken in due time, can be shown on a motion to dismiss the appeal.

It is, indeed, urged, though but faintly, that the present appeal was taken too late. The order was made on the 28th of *August*, and the appeal was prayed on the 30th of that month. The statute requires such appeals to be taken at the time the orders are made. At the time, means, literally, simultaneously with; but Courts always construe

such a phrase to mean such reasonable time as may be necessary to do the act required. The precise period of time thus required must vary according to circumstances, and we cannot say, merely from the dates, that in this case an unreasonable time was allowed the appellants to perfect their appeal.

Nov. Term,
1851.

FORNEY
v.
GOODHUE.

We are of opinion, therefore, that the Revised Statutes give the right of appeal in cases like the present, and, such being the case, the statute passed in 1847 does not affect that right. That statute provides that an appeal may be taken at any time during the next ensuing term of the Court; but it does not repeal, nor does it conflict with, the previous statute authorizing an appeal to be taken at the time of the making of the order.

Per Curiam.—The motion to dismiss the appeal is overruled.

R. Crawford, A. L. Osborn, J. G. Marshall, J. F. Joy, and C. Dewey, for the appellants.

J. L. Jernegan, J. B. Niles, O. H. Smith, and S. Yandes, for the appellees.

(1) *Laws* 1847, p. 113.

FORNEY v. GOODHUE.

ERROR to the *Wabash* Circuit Court.

Per Curiam.—*Goodhue* brought an action of trespass against *Forney*. The complaint was for shooting the plaintiff's mare.

Plea, not guilty.

Verdict for the plaintiff. Motion for a new trial overruled, and judgment on the verdict.

The motion for a new trial was founded on newly discovered evidence. An affidavit of the defendant, and another by one *David Tipton*, show the ground of the motion. The record contains all the evidence given in the cause. There is a good deal of evidence, but it is not

Nov. Term,
1851.

BYRKET
v.
THE STATE

very strong against the plaintiff. The newly discovered evidence, stated in said affidavits, satisfies us that there ought to be another trial.

The judgment is reversed, and the verdict set aside, with costs. Cause remanded for another trial.

J. U. Pettit and D. D. Pratt, for the plaintiff.

BYRKET, and Others, v. THE STATE, on the Relation of SILVERS.

Debt on the official bond of a justice of the peace. Breach, the non-payment of money collected by the justice to the party entitled. Plea, a former recovery. It appeared, on the trial, that in the former suit pleaded, which was on the same bond and between the same parties, the plaintiff obtained judgment for several sums of money which had been collected by the justice and not paid over; but that two of the sums collected by the justice and not paid over by him, had been omitted, by mistake, in taking the former judgment. This suit was brought to recover those two sums. *Held*, that the former recovery was not a bar to the present suit.

Wednesday,
December 10.

ERROR to the *Henry* Circuit Court.

BLACKFORD, J.—This was an action of debt commenced before a justice of the peace, and taken by appeal to the Circuit Court.

The State, on the relation of *Silvers*, was the plaintiff. Demand 95 dollars.

The suit was founded on the official bond of *Poston*, a justice of the peace. The breach assigned is, the non-payment of money collected by the justice to the party entitled.

The defendants pleaded a former recovery.

The cause was submitted to the Court, and judgment rendered for the plaintiff.

The record contains all the evidence.

It appears that in the former suit pleaded, which was on the same bond and between the same parties with the present one, the plaintiff obtained judgment for several

sums of money, which had been collected by the justice and not paid over; but that two of the sums of money collected by the justice and not paid over by him, had been omitted, by mistake, in taking the former judgment. This suit is brought to recover those two sums.

Nov. Term,
1851.

BYRNES
v.
THE STATE.

There can be no doubt of the plaintiff's right to recover, unless the former judgment between the same parties is a bar.

We do not think, under the circumstances, that this suit can be defeated by the former recovery (1).

Per Curiam.—The judgment is affirmed with costs.

J. S. Newman, for the plaintiffs.

M. L. Bundy and *J. Davis*, for the defendant.

(1) *Assumpsit by Seddon et al. v. Tutop* for goods sold and delivered. Plea, a former recovery. Replication, that the promise in this suit was not the same for the non-performance of which the former judgment pleaded was rendered. Upon the trial, it appeared that the former suit was upon a promissory note and for goods sold, and that, upon the execution of a writ of inquiry, after judgment by default, the plaintiff not being prepared with proof as to the goods sold, took a verdict for the amount of the note only, and brought this action for the goods sold. The Court of *King's Bench* ruled that the former judgment was no bar to this action. 6 T. R. 607.

B. brought an action of trespass against *C.* for an injury done to two horses, in consequence of which one of them died, and the trespass on one of them was on one day, and on the other at another day, and the same being all in one count, the Court, on the defendant's motion, compelled the plaintiff to elect for which trespass he would proceed, and the plaintiff elected to go for the injury done to the horse that survived, and the jury found a verdict accordingly. Another action having been brought for the trespass on the horse which died of the injury, the defendant pleaded a former recovery for the same trespass. The plaintiff replied, setting forth the above facts by way of *protestando*. On a demurrer to the replication, it was held that the former recovery was no bar, since it appeared by the replication that the injury done to the horse which died, was not taken into consideration by the jury. The replication was, however, held to be bad, for stating these facts by way of *protestando*, instead of traversing and denying a former recovery for the same matter. *Snider v. Croy*, 2 Johns. 227.

Nov. Term,
1851.

BURGESS
v.
CLARK.

BURGESS v. CLARK.

Proceeding in domestic attachment. Plea, that when the suit was commenced, and for 18 months previously, and from thence hitherto, the defendant was an inhabitant and resident of the territory of *Wisconsin, &c.* To support the plea, it having first been proved that the defendant had left *Allen* county in this state some two years previously to the commencement of the suit, evidence was received of the declarations of the defendant when he left that he was going to some of the western territories, and of his intention as to returning. *Held*, that the evidence was admissible as a part of the *res gesta*.

Post-marks on letters are admissible in evidence, in a civil case, without proof, where no reason is shown for doubting their genuineness.

Wednesday,
December 10.

APPEAL from the *Allen* Circuit Court.

BLACKFORD, J.—This was a suit commenced in the *Allen* Circuit Court in 1848, by writ of domestic attachment. *Burgess* was the plaintiff and *Clark* the defendant.

Plea, that when the suit in attachment was commenced, and for eighteen months previously, and from thence hitherto, the defendant was an inhabitant and resident of the territory of *Wisconsin*, and not of the state of *Indiana*.

Replication in denial of the plea. This cause was tried in 1848. A witness for the defendant stated that, in *July*, 1846, the defendant left *Allen* county in this state; and that previously and up to that time, he, the defendant, resided in said *Allen* county. The witness further stated that, when the defendant went away, he said he was going to some of the western territories, and might or might not return.

That part of said testimony which relates to what the defendant, when he went away, told the witness, was objected to by the plaintiff; but the objection was correctly overruled. What the defendant thus said was part of the *res gesta*.

The witness produced two letters purporting to be signed by the defendant, and directed to him, saying that he was well acquainted with the defendant's hand-writing. The letters were dated in *August*, 1846, and post-marked, *Port Washington, Wisconsin, August, 1846*, in writing, and purported to be signed by the defendant.

The post-marks and signatures on said letters were offered and given in evidence; to which the plaintiff objected; but the Court overruled the objection. We understand, from the above, that the letters were proved. The post-marks were admissible without proof, it not being shown that there was any reason to doubt of their being genuine (1).

Nov. Term,
1851.

TIMMONS
v.
TIMMONS.

The record contains all the evidence; and we think it sufficient to support the verdict.

Per Curiam.—The judgment is affirmed with costs.

J. G. Walpole, for the appellant.

R. Brackenridge, Jr., for the appellee.

(1) In civil cases, but not in criminal, the post-mark on a letter is sufficient *prima facie* evidence of the time and place of putting it into the post-office. And if there be any doubt of the post-mark, it may be established by the evidence of any person in the habit of receiving letters with that mark, as well as by the clerk in the post-office. 2 Greenleaf Ev., s. 193.

TIMMONS and Others v. TIMMONS.

Decree in the Probate Court for the sale of real estate of an intestate upon the petition of the administrator. Assignment of error in the Supreme Court, that a final decree was taken against an infant defendant, A., without the appointment of a guardian *ad litem* for her, and upon the appearance by attorney. Plea to the assignment, that at the time of the rendition of the decree, the said A. was of full age. Held, upon demurrer, that the plea was bad.

ERROR to the *Tippecanoe* Probate Court.

Wednesday,
December 17.

BLACKFORD, J.—The defendant in error, as administrator of *Stephen Timmons*, deceased, filed a petition in the Probate Court of *Tippecanoe* county, for an order to sell certain real estate of the intestate. There were several defendants, one of whom was *Amelia Timmons*.

The Court granted an order for the sale of the real estate described in the petition.

Nov. Term,
1851.

BURGESS
v.
CLARK.

BURGESS v. CLARK.

Proceeding in domestic attachment. Plea, that when the suit was commenced, and for 18 months previously, and from thence hitherto, the defendant was an inhabitant and resident of the territory of *Wisconsin, &c.* To support the plea, it having first been proved that the defendant had left *Allen* county in this state some two years previously to the commencement of the suit, evidence was received of the declarations of the defendant when he left that he was going to some of the western territories, and of his intention as to returning. *Held*, that the evidence was admissible as a part of the *res gestæ*.

Post-marks on letters are admissible in evidence, in a civil case, without proof, where no reason is shown for doubting their genuineness.

Wednesday,
December 10.

APPEAL from the *Allen* Circuit Court.

BLACKFORD, J.—This was a suit commenced in the *Allen* Circuit Court in 1848, by writ of domestic attachment. *Burgess* was the plaintiff and *Clark* the defendant.

Plea, that when the suit in attachment was commenced, and for eighteen months previously, and from thence hitherto, the defendant was an inhabitant and resident of the territory of *Wisconsin*, and not of the state of *Indiana*.

Replication in denial of the plea. This cause was tried in 1848. A witness for the defendant stated that, in *July*, 1846, the defendant left *Allen* county in this state; and that previously and up to that time, he, the defendant, resided in said *Allen* county. The witness further stated that, when the defendant went away, he said he was going to some of the western territories, and might or might not return.

That part of said testimony which relates to what the defendant, when he went away, told the witness, was objected to by the plaintiff; but the objection was correctly overruled. What the defendant thus said was part of the *res gestæ*.

The witness produced two letters purporting to be signed by the defendant, and directed to him, saying that he was well acquainted with the defendant's hand-writing. The letters were dated in *August*, 1846, and post-marked, *Port Washington, Wisconsin, August, 1846*, in writing, and purported to be signed by the defendant.

The post-marks and signatures on said letters were offered and given in evidence; to which the plaintiff objected; but the Court overruled the objection. We understand, from the above, that the letters were proved. The post-marks were admissible without proof, it not being shown that there was any reason to doubt of their being genuine (1).

Nov. Term,
1851.

TIMMONS
v.
TIMMONS.

The record contains all the evidence; and we think it sufficient to support the verdict.

Per Curiam.—The judgment is affirmed with costs.

J. G. Walpole, for the appellant.

R. Brackenridge, Jr., for the appellee.

(1) In civil cases, but not in criminal, the post-mark on a letter is sufficient *prima facie* evidence of the time and place of putting it into the post-office. And if there be any doubt of the post-mark, it may be established by the evidence of any person in the habit of receiving letters with that mark, as well as by the clerk in the post-office. 2 Greenleaf Ev., s. 193.

TIMMONS and Others v. TIMMONS.

Decree in the Probate Court for the sale of real estate of an intestate upon the petition of the administrator. Assignment of error in the Supreme Court, that a final decree was taken against an infant defendant, A., without the appointment of a guardian *ad litem* for her, and upon the appearance by attorney. Plea to the assignment, that at the time of the rendition of the decree, the said A. was of full age. *Held*, upon demurrer, that the plea was bad.

ERROR to the *Tippecanoe* Probate Court.

Wednesday,
December 17.

BLACKFORD, J.—The defendant in error, as administrator of *Stephen Timmons*, deceased, filed a petition in the Probate Court of *Tippecanoe* county, for an order to sell certain real estate of the intestate. There were several defendants, one of whom was *Amelia Timmons*.

The Court granted an order for the sale of the real estate described in the petition.

Nov. Term,
1851.

LAUGHLIN
v.
PRESIDENT AND
TRUSTEES OF
LAMASCO CITY.

The defendants below are the plaintiffs in error.

One of the assignments of error is, that a final decree is taken against an infant defendant, *Amelia Timmons*, without the appointment of a guardian *ad litem* for her, and upon the appearance by attorney.

To that assignment, the defendant in error (the petitioner) pleaded that, at the time of the rendition of the decree, the said *Amelia* was of full age.

Demurrer to the plea.

This demurrer must be sustained. The said assignment of error is correctly filed in this Court, if the error complained of appears in the transcript. If such error does not appear on the face of the transcript, the proper plea is, *in nullo est erratum*.

This not being a case relating to a will, we must be governed in our decision by what appears in the transcript. R. S. p. 634, s. 54.

Per Curiam.—The demurrer is sustained.

J. Pettit and *S. A. Huff*, for the plaintiff.

D. Mace and *W. C. Wilson*, for the defendant.

LAUGHLIN and Others v. THE PRESIDENT AND TRUSTEES OF
LAMASCO CITY.

APPEAL from the 'Vanderburgh Circuit Court.

Per Curiam.—Motion to dismiss the appeal.

This motion must be overruled. The statute authorizing an appeal from any order granting an injunction, applies to this case. R. S. pp. 636, 637. *The Michigan Central Railroad Co. v. The Northern Indiana Railroad Co.*, at this term (1).

The motion is overruled.

C. Baker, for the appellants.

J. G. Jones and *J. E. Blythe*, for the appellees.

(1) See *ante*, p. 239.

THE LAWRENCEBURGH AND UPPER MISSISSIPPI RAILROAD COM-
PANY v. SMITH.

Nov. Term,
1851.

RAGAN
v.
LOWER.

The 15th section of the charter of the *Lawrenceburgh and Upper Mississippi Railroad Company* does not preclude the company from prosecuting a writ of error to the Supreme Court from an award of damages for land taken by the company in the construction of their road, although that section states that the judgment of the Circuit Court shall be final.

ERROR to the *Dearborn* Circuit Court.

Per Curiam.—Motion by *Smith* to dismiss the writ of error, on the ground that, by statute, this Court has no jurisdiction of the case.

This motion is founded on the 15th section of the charter of the plaintiffs in error. Local Laws, 1847-'8 (1). That section says that the judgment of the Circuit Court, in cases like the present, shall be final. We do not think that that language is sufficiently explicit, to authorize us in saying that a writ of error will not lie in this case.

The motion is overruled.

G. H. Dunn, for the plaintiffs.

(1) See Local Laws, 1848, p. 435, s. 15, and Local Laws, 1850, p. 445, s. 6.

RAGAN and Another v. LOWER and Others.

A. mortgaged to the commissioners of the *Sinking Fund*, an 80 acre and a 70 acre tract of land, to secure a loan, and afterwards deeded the 80 acre tract to *B.* Afterwards, the following arrangement was made between *A.*, *B.*, and the commissioners: The latter agreed that if *B.* would pay 20 dollars on the mortgage, and execute a mortgage for 80 dollars on the 80 acre tract, the sum of 100 dollars should be credited on *A.*'s mortgage, and the 80 acre tract should be released from it. *B.* did so; and *A.* thereupon credited the amount of 100 dollars on the purchase-money. The commissioners, by carelessness, omitted to release the 80 acre tract from *A.*'s mortgage, and afterwards sold both tracts, for the non-payment of interest by *A.* on his mortgage, to one *F.*, who afterwards sold the same to the son and agent of *A.* *B.* having conveyed said 80 acre tract to *C.*, and *C.* to *D.*, the latter filed his bill to compel *A.*'s son to relinquish to him said 80 acre tract. *A.*, and his said son, and *C.* and the commissioners

Nov. Term,
1851.

RAGAN
v.
LOWER.

were made defendants. The commissioners filed a cross-bill, offering to pay back the amount received at the sale, and praying that the sale might be set aside, &c. The Circuit Court decreed that *A.*'s son should convey the 80 acre tract to *D.* and the 70 acre tract to *A.* *Held*, that so much of the decree as required the conveyance of the 80 acre tract by the son to *D.*, was right; but that the part of the decree requiring the son to convey to *A.* the 70 acre tract, was wrong—*A.* having not asked that it should be done, and no rights of third persons appearing to have intervened. *Held*, also, that *B.* and *C.* were not necessary parties to the suit.

Saturday,
December 20.

ERROR to the *Hendricks* Circuit Court.

PERKINS, J.—*Andrew T. Lower* brought his bill in chancery against *Zachariah S. Ragan, Robert Ragan, John J. Owsley*, and the commissioners of the sinking fund of *Indiana*, setting forth that *Robert Ragan*, on the 4th day of *January*, 1836, mortgaged to said commissioners, by one conveyance, an 80 acre and a 70 acre tract of land, situate in *Hendricks* county, to secure the payment, in five years, of 200 dollars, with annual interest; that on the 14th of *December*, 1838, said *Ragan* deeded the 80 acre tract, for the consideration of 300 dollars, to *Samuel Carbaugh*, which deed was recorded *January* 17, 1839; that afterwards, and before *February* 17th, 1841, the following arrangement was made between said *Carbaugh, Ragan*, and the sinking fund commissioners, to-wit: that *Carbaugh* should pay the sinking fund commissioners 20 dollars; should execute to them a mortgage on the 80 acre tract of land, purchased of said *Ragan*, for 80 dollars; that these two sums, (the 20 and the 80 dollars, making 100 dollars,) should be credited on the mortgage of *Ragan* for 200 dollars on the 80 acre and the 70 acre tracts, to said commissioners; that thereupon said 80 acre tract should be released from the operation of said 200 dollar mortgage, and 100 dollars be credited by *Robert Ragan* to said *Carbaugh* on the purchase-money of said 80 acre tract; that in pursuance of said arrangement, the 20 dollars was paid, the mortgage for 80 dollars was executed by *Carbaugh* to the commissioners, the credit of 100 dollars was given by them on the *Ragan* mortgage, and *Carbaugh* was credited with the 100 dollars by *Ragan*.

but the commissioners, by carelessness, neglected to enter the release of *Carbaugh's* 80 acre tract from the operation of *Ragan's* prior mortgage to said commissioners; that, afterwards, on the 25th of *September*, 1841, *Carbaugh* sold and conveyed said 80 acre tract, subject to the mortgage executed by him to the sinking fund commissioners on the same, to one *English Stevens*; and that said *Stevens*, on the 25th of *April*, 1842, sold and conveyed the same to the plaintiff in this bill, *Andrew T. Lower*, subject to said last-mentioned mortgage, and on which mortgage *Lower* had since regularly paid the interest to the sinking fund commissioners. The bill further alleges that *Ragan* neglected to pay the interest on the remaining 100 dollars of his mortgage upon both tracts of land, whereby said mortgage became forfeited, and the commissioners, forgetting that they had agreed to release the 80 acre tract, sold both of said tracts, the 80 acre and the 70 acre, to *John J. Owsley*, for the balance due on said *Ragan* mortgage; that *Owsley* subsequently conveyed the whole of the land to *Zachariah S. Ragan*, the son, and agent in the business, of said *Robert Ragan*, the original mortgagor; that said *Zachariah* now claims to hold the whole of said land, as against his father, and all others, whereby said *Lower* will lose his 80 acre tract, and the sinking fund commissioners the 80 dollars which they credited on said original mortgage from *Ragan* on receiving the mortgage on the 80 acre tract from *Carbaugh*.

The bill prays that *Zachariah S. Ragan* may be compelled to relinquish to the plaintiff, *Lower*, his said 80 acre tract of land.

The two *Ragans*, *Owsley*, and the sinking fund commissioners answered. *Carbaugh* and *Stevens* are not made parties to the suit. The said commissioners made their answer a cross-bill, offered to pay back the amount received at the sale by them, and prayed that said sale might be set aside and all things placed as they were before it took place. Depositions were taken, the cause submitted to the Court, and a somewhat lengthy de-

Nov. Term,
1851.

RAGAN
v.
LOWER.

Nov. Term,
1851.

RAGAN
v.
LOWER.

decree made, which it will not be necessary to set out at length.

Owsley having relinquished the title obtained by him at the commissioners' sale, to *Zachariah S. Ragan*, who, the case shows, was the agent of *Robert Ragan*, and possessed of knowledge of all the facts and equities of the case when he took the title from *Owsley*, the case stands, substantially, as it would, had *Robert Ragan* been the purchaser, instead of *Owsley*, at the commissioners' sale. Had said *Robert* been the purchaser at said sale, the merits of this case would have been easily determined. Having previously conveyed the 80 acre tract, which had passed by mesne conveyances to *Lower*, and being bound to pay the prior mortgage incumbering said 80 acre and said 70 acre tracts, his purchase at the mortgage-sale would have been but a mode of satisfying said mortgage, and the title obtained thereby, as to the 80 acre tract, would have inured to the benefit of *Lower*, and as to the 70 acre tract, it would have perfected the title in himself; and no legal proceedings would have been necessary on the part of *Lower*. But, in the case, as it stands, the title being held by *Zachariah S. Ragan*, agent of *Robert*, it was proper to decree a conveyance, from him to *Lower*, of the 80 acre tract, and that the same should be held by *Lower* subject to the mortgage by *Carbaugh*, which he had assumed, to the sinking fund commissioners. But as to the 70 acre tract, as *Robert Ragan* had not asked that the title to it should be conveyed from his agent to him, and as no rights of third persons, so far as appears, required such conveyance, we think it should have been left undisturbed. We think that part of the decree requiring *Z. S. Ragan* to convey to *Lower* his 80 acres, and that *Lower* should hold the same subject to the 80 dollar mortgage of *Carbaugh*, should be affirmed, with costs; but that the balance of the decree should be reversed.

We do not think it was material that *Carbaugh* and *Stevens* should be made parties to this bill.

Per Curiam.—That part of the decree requiring *Zacha-*

riah S. Ragan to convey to *Lower* said 80 acre tract of land, subject to said mortgage of *Carbaugh*, is affirmed, with costs. The residue is reversed.

C. C. Nave, for the plaintiffs.

J. Morrison and *S. Major*, for the defendants.

Nov. Term,
1851.

DE PUY

v.

EVERETT.

DE PUY v. EVERETT.

The Supreme Court cannot say that the Circuit Court erred in overruling a motion for a continuance, when the affidavit, on which the motion was founded, refers to another affidavit as containing the facts relied upon for the continuance, which latter affidavit, though made in the same cause, is not a part of the record.

ERROR to the *Wabash* Circuit Court.

BLACKFORD, J.—*Everett* sued *De Puy* in *assumpsit*. At the *March* term, 1850, which was the term to which the writ was returnable, the cause was continued on the defendant's motion.

Thursday,
January 22,
1852.

At the *September* term, 1850, the defendant again moved for a continuance, but the motion was overruled.

Plea, the general issue. Cause submitted to the Court, and judgment rendered for the plaintiff.

The overruling of the defendant's last motion for a continuance is assigned for error.

The affidavit, on which this last motion was founded, (admitting it to be a part of the record,) refers to an affidavit made at the previous term for a continuance; but the affidavit referred to is not a part of the record. The affidavit last made, therefore, can receive no aid from the one to which it refers; and it is insufficient, for not showing the principal facts expected to be proved by the absent witness. R. S. p. 719.

We cannot say, therefore, that the Court erred in overruling the defendant's last motion for a continuance.

Nov. Term,
1851.

THE STATE
v.
BARBEE.

Per Curiam.—The judgment is affirmed, with costs.

D. D. Pratt, for the plaintiff.

D. M. Cox, for the defendant.

THE STATE v. BARBEE.

Sections 22 and 23 of the 4th article of the new constitution of *Indiana*, are to be construed as operating prospectively.

Local laws which were in existence at the time said constitution took effect, and were not inconsistent with it, were expressly continued in force by it.

Thursday,
January 22,
1852.

ERROR to the *Marion* Circuit Court.

PERKINS, J.—This is an indictment, found at the *December* term, 1851, of the *Marion* Circuit Court, against *Sampson Barbee*, for retailing a spirituous liquor in a less quantity than a quart, without license. It is based upon section 93, p. 979, of the R. S. 1843, which enacts that every person who shall so retail any spirituous liquor shall be fined. The indictment was quashed in the Circuit Court, on the ground that the section of the statutes above referred to, was local in its operation, and hence was abrogated by the new constitution, adopted in *August*, 1851.

It is admitted that said section was general in its operation, on its enactment; but it is claimed that it had been rendered local before the adoption of the new constitution, by being repealed as to one or more of the counties in the state.

Conceding for the present, for the sake of the argument, that this latter position is correct, we proceed at once to the question, whether the new constitution, on coming into force, did repeal or abrogate the existing local statutes of the state, in the cases specified in the 22d section of the 4th article of said constitution.

The question is important and deserves careful consideration.

Said section 22 is as follows:

Nov. Term,
1851.

"The general assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say:

THE STATE
v.
BARBER.

"Regulating the jurisdiction and duties of justices of the peace and of constables;

"For the punishment of crimes and misdemeanors;

"Regulating the practice in Courts of justice;

"Providing for changing the venue in civil and criminal cases;

"Granting divorces;

"Changing the names of persons;

"For laying out, opening, and working on, highways, and for the election or appointment of supervisors;

"Vacating roads, town plats, streets, alleys, and public squares;

"Summoning and impanneling grand and petit juries, and providing for their compensation;

"Regulating county and township business;

"Regulating the election of county and township officers, and their compensation;

"For the assessment and collection of taxes for state, county, township, or road purposes;

"Providing for supporting common schools, and for the preservation of school funds;

"In relation to fees or salaries;

"In relation to interest on money;

"Providing for opening and conducting elections of state, county, or township officers, and designating the places of voting;

"Providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities, by executors, administrators, guardians, or trustees."

The 23d section of said 4th article of said constitution is as follows:

"In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state."

Nov. Term,
1851.

THE STATE
v.
BARBER.

It is contended that local laws, in the cases enumerated in said section 22, and in other like cases, existing at the coming into force of the new constitution, were inconsistent with said section 23, and were, therefore, abrogated by it.

It will hence be necessary here to inquire whether said 23d section is to be construed prospectively, or as having an immediate operation upon existing laws.

Section 22 is plainly prospective; plainly a restriction upon the powers of future legislatures; and we think section 23 should be construed to have a like operation with section 22. Both sections are upon the same subject. Indeed, section 23 seems to be but a conclusion to section 22, expressing affirmatively, in general terms, the principle established by the latter section, and extending that principle to any and all cases where it may be applicable, that might have been overlooked in the enumeration in section 22. Section 22 declares that, in certain cases, laws shall not be local; and section 23 simply declares how, or what, in those, and the like cases, laws shall be, viz., general and uniform. And the question is, when are they to be general and uniform? It seems to us, when a legislature, under the new constitution, shall enact laws in said cases. It would be unreasonable to suppose that the convention intended they should be so, before the power existed that could make them thus. In fact, they cannot be till then. The construction given the section by the Circuit Court can produce the uniformity no earlier. The only effect of that construction is to leave us without laws, in the enumerated, and other like cases, till uniform laws are enacted by a legislature. The constitution itself provides no laws in said cases, and yet it declares that the laws, *in these cases*, shall be uniform in operation throughout the state; thus contemplating the existence of positive laws in these very cases, and referring, by its very terms, to the future, when such uniform laws can be enacted. The section of the constitution in question does not say that existing local laws in said cases are abrogated by it, but that the laws in them shall be uniform. Yet

the construction given below to the section, makes it abrogate said local laws, and does not substitute in lieu of them uniform laws, but the absence of all laws, which is not contemplated by the section. We say it substitutes the absence of all laws in said cases. Take one of the enumerated cases as an example—that “regulating the practice in Courts of justice.” A general law may have been passed operating all over the state. Subsequently, it may have been repealed, and a different law enacted as to a particular county. This, according to the decision below, renders both laws local. The new constitution comes into force, and abrogates both. It substitutes no new uniform law governing the practice, and the consequence is, we have no law upon the practice of the law. So in relation to the laying out, and working on, highways; the jurisdiction and duties of justices of the peace and constables; summoning jurors; regulating county business; the assessment of taxes; the supporting of common schools, and preservation of school funds, &c.

We are satisfied that sections 22 and 23, of article 4, of the constitution, should be construed to operate prospectively.

This being the case, the next question presented is, whether local laws existing at the taking effect of the new constitution, are inconsistent with provisions in said constitution prohibiting the passage, by future legislatures, of local laws. We do not understand the affirmative of this proposition to be contended for, and we think it cannot be successfully.

Existing local laws, then, being not inconsistent with the present constitution, are expressly continued in force by it. The first provision of the schedule annexed to said constitution, as a part thereof, declares: “That no inconvenience may arise from the change of the government, it is hereby ordered as follows: First; all laws now in force, and not inconsistent with this constitution, shall remain in force until they shall expire or be repealed.”

Nov. Term,
1851.

THE STATE
V.
BARREZ.

Nov. Term,
1851.

BREWER
v.
THORP.

It is the unanimous opinion of this Court that the decision of the Court below must be reversed.

In the course of this opinion, we have conceded for the purposes of this case, that the law under which this indictment was found, had been rendered local by its repeal in one or more counties; but we do not wish to be understood as deciding the point. It is not material to the final disposition of this cause, and hence does not properly arise for decision in it. If the law was not rendered local, it has plainly not been abrogated; nor has it, as we have decided, if it was rendered local.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. S. Gooding, for the state.

H. C. Newcomb, for the defendant.

3 288
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BREWER v. THORP.

Where it is a part of the contract for the future conveyance of land, that the vendee shall labor for a specific period for the vendor, the vendee cannot entitle himself to the conveyance by tendering a sum of money, after the time fixed for the execution of the deed, as an equivalent for the non-performance of the labor; at least, unless the performance of it was prevented by the vendor.

Thursday,
January 27,
1852.

ERROR to the *Randolph* Circuit Court.

SMITH, J.—This was a bill in chancery to obtain the specific performance of a contract for the sale of a tract of land.

The bill alleges that, on the 11th of *November*, 1845, *Israel Thorp*, the defendant, was the owner of the tract of land in question, and sold the same to his son, *Greenberry Thorp*, for a sum, the precise amount of which is unknown to the complainant; that said *Greenberry* had paid the full amount of the purchase-money, except 50 dollars, which was to have been paid in cash on or before the 25th of *December*, 1846, and three months' labor, which was to

have been performed by the said *Greenberry* on the farm of the said *Israel*, and as to which no definite time was fixed.

Nov. Term,
1851.

BREWER
v.
THORP.

A title-bond executed by the said *Israel* to the said *Greenberry*, is also set out. This bond is in the penalty of 300 dollars, and is conditioned that said *Israel*, or his heirs, shall, on or before the 25th of *December*, 1846, at the request of said *Greenberry*, or his assigns, make a good deed for said land to the said *Greenberry*, or his assigns, and shall, in the meantime, permit said obligees to remain in possession. It contains no stipulation as to the payment of purchase-money.

The bill alleges that, on the 10th of *December*, 1846, the said *Greenberry* assigned said bond to the complainant, the latter agreeing to pay the 50 dollars remaining due, and also the balance due on the work remaining to be done by the said *Greenberry* for the said *Israel*. It is also alleged that the said *Greenberry* had performed one and a half months' work pursuant to the contract, and had been hindered from performing the balance; but it is not stated *how* he was so hindered.

The complainant avers that since the expiration of the time at which said *Israel* was to make the deed, to-wit, on the 18th of *January*, 1847, and at divers other times, the complainant called upon him, informed him that he held the title-bond, and requested a deed; and that the complainant tendered him 71 dollars, and now brings that sum into Court for him, and also tendered him a deed to execute, and that he refused to do so.

The bill further alleges that at the time of the sale to *Greenberry*, there was a mortgage to the school commissioner to secure the payment of 75 dollars, which then was, and still is, an incumbrance on the land.

Prayer, that said *Israel* be required to pay said mortgage-debt and execute a deed to the complainant.

The bill was demurred to, for want of equity, and because *Greenberry Thorp* was not made a party.

The Court sustained the demurrer, and then ordered the bill to be continued over to give the complainant time

Nov. Term,
1851.

SYMONS
v.
SMITH.

to amend by making the said *Greenberry* a party. At the next term, the complainant having failed to amend, the bill was dismissed.

We think the bill was rightly dismissed, on the ground that it does not show a sufficient performance of the contract set out, on the part of the vendee, to entitle the latter or his assignee to enforce a specific performance by the vendor. If it was a part of the contract of purchase, as the complainant himself alleges it was, that the vendee was to perform a certain amount of labor for the vendor, the tender by the complainant of a sum of money at the time mentioned in the bill, was not an equivalent, at least unless the performance of the work was prevented by the vendor. It is not charged that the vendee was hindered from performing the labor by any act of the vendor, and as we consider the bill fatally defective in this particular, it is unnecessary to examine any other objection made to it.

Per Curiam.—The decree is affirmed, with costs.

D. Kilgore, for the plaintiff.

B. McClelland, for the defendant.

SYMONS v. SMITH.

Tuesday,
January 27,
1852.

APPEAL from the *Grant* Circuit Court.

SMITH, J.—This was a bill in chancery to enforce the specific performance of a contract for the sale of a tract of land. A decree was rendered in favor of the complainant.

The title-bond, given by *Symons*, was for the making of a good title to the land in question to *Bedsaul* and *Macy*, and had been assigned by them to the complainant. It contains no mention of the consideration, nor does it specify any time when the title was to be made.

The defense set up was, that there was a balance due *Symons* upon a certain note made by *Bedsaul* and *Macy*.

upon which *Symons* had obtained a judgment at law before the commencement of this suit, and that the said note had been given for a portion of the purchase-money *Bedsaul* and *Macy* were to pay him before the deed was to be made.

Nov. Term,
1851.

HEASTON
v.
COLGROVE.

The evidence contained in the depositions, as to whether the note above-mentioned was given for a part of the purchase-money is contradictory; but we think, upon the whole, it was not sufficiently proved, against the testimony of the complainant, that the note in question was given for such purchase-money. The decree must, therefore, be affirmed.

Per Curiam.—The decree is affirmed with costs.

J. Brownlee and *W. March*, for the appellant.

D. Kilgore, for the appellee.

HEASTON v. COLGROVE.

A plaintiff cannot recover upon a special count for the non-performance of a written agreement, if the evidence shows that he failed to fulfill his part of the agreement.

A defendant, sued upon a parol contract, may prove, by way of recoupment, any damages he has sustained by the breach of the contract by the plaintiff, if he has pleaded or given notice of such defense.

Instructions given to the jury cannot be objected to in the Supreme Court, unless they were excepted to in the Court below.

ERROR to the *Randolph* Circuit Court.

Friday,
January 30,
1852.

PERKINS, J.—*Silas Colgrove* sued *David Heaston* in an action of *assumpsit*. The declaration contained special counts, and a common count. The special counts were upon the following instrument:

“An article of agreement made and entered into by and between *David Heaston* of the one part, and *Silas Colgrove* of the other part, on this 17th day of *May*, A. D., 1847, witnesseth: that the said party of the first part for themselves, agree to furnish one double carding machine at the steam saw-mill in *Winchester, Randolph* coun-

Nov. Term,
1851.

HEASTON
v.
COLGROVE.

ty, *Indiana*; also, the necessary power to run two carding machines during the present season, or so long as there is carding to be done during the present season; they also agree to put and keep said machine in good carding order, at his expense, and to furnish fuel necessary to run said steam-power, engines, &c.

"The said *Silas Colgrove* agrees to furnish one double carding machine, which is now owned by him, and set it up in the building now occupied by said *Heaston* and *Hutchens* for carding, and put said machine in as good order for carding as *Heaston* and *Hutchens's* machine is, and keep it so, at his own expense; also a picker. And he also agrees to pay the said *Heaston* and *Hutchens* 50 cents per day for each day that said machines are run, for the power to run them; and each of said parties are to pay one-half of the expense for hands necessary to card, and the proceeds of all the carding done during the season to be equally divided between the parties, to-wit: said *Heaston* and *Hutchens* to have one-half, and the said *Colgrove* to have one-half. If said machines are run after night, the said *Colgrove* is to pay at the rate of 50 cents per day for the time run, for the power. Proceeds to be divided once a week." (Signed,) "*David Heaston, Silas Colgrove.*"

These counts alleged for breach that said *Heaston* did not comply with his part of the agreement, &c.

The common count was for the use of a wool-picker for a long time, &c.

The general issue was pleaded, and several special pleas. The special pleas were held bad on demurrer. The cause was tried upon the general issue, and the plaintiff had judgment.

The judgment must be reversed. The declaration is not sustained by proof. The evidence shows clearly that the plaintiff failed to comply with the agreement sued on, on his own part. He could not, therefore, recover on the special count on said agreement. The count for the use of the picker is only proved to the amount of 8 dollars, while the judgment is for a sum exceeding 20 dollars.

On the trial, the Court refused to permit *Heaston* to give evidence as to the damage he had sustained by *Colgrove's* breach of the agreement. *Heaston* had a right, on pleading or giving notice of such defense, to give evidence thereof on the trial on the common count, by way of recoupment of damages. *Epperly v. Bailey*, at this term (1).

Nov. Term,
1851.

FRENCH
v.
GREEN.

The Court gave written instructions to the jury. They thereby became a part of the record. Some of those instructions are complained of in this Court; but, as they were not excepted to below, they cannot be objected to here. If evidence is given on the trial, and is incorporated in a bill of exceptions, and thus made a part of the record, we do not reverse the cause in which it is given, unless it appears, also, that the evidence was objected to, even though said evidence was not legally admissible. The party, by not making his objection below, waives it. So in reference to instructions.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

B. McClelland, for the plaintiff.

D. Kilgore, for the defendant.

(1) See *ante*, p. 72.

FRENCH v. GREEN.

The verdict of a jury will not be set aside by the Supreme Court as being contrary to the evidence, unless it is plainly so.

ERROR to the *Ohio* Circuit Court.

PERKINS, J.—Assumpsit by *Moses Green*, assignee of *Hugh Dougherty*, against *Jefferson A. French*, upon a promissory note. Pleas: 1. The general issue; and 2. That the defendant had discharged 70 dollars of the note, before its assignment, by a certain arrangement with the payee thereof. Issues of fact were formed, and were tried

Friday,
January 30,
1852.

Nov. Term,
1851.

KEISTER
v.
HOWE.

by a jury. Verdict for the plaintiff for the full amount of the note and interest. A motion for a new trial was overruled.

The only question for this Court to decide is, whether the defense as to 70 dollars, was made out so clearly by the evidence as to require us to set aside the finding of the jury. We do not think it was. It must be a plain case that will authorize this Court to set aside a verdict. In this, but one witness testified, and he was the defendant's attorney. His testimony is not entirely satisfactory; and it, with the credibility of the witness, was for the consideration of the jury.

Per Curiam.—The judgment is affirmed with costs.

D. S. Major and *A. Brower*, for the plaintiff.

J. W. Spencer and *D. Kelso*, for the defendant.

KEISTER v. HOWE and Wife.

A husband who comes into possession of money held by his wife in trust, whether as her administrator, or otherwise, is held as a trustee, and may be compelled, in chancery, to account for it.

Wednesday,
February 25,
1852.

APPEAL from the *Union Circuit Court*.

SMITH, J.—We think it is sufficiently established by the evidence in this case, that the money in controversy was in the possession of *Maria*, the widow of *William Taylor*, before her marriage with *Keister*, and was held by her in trust for the use of her daughter, who was the sole heir of her first husband. This is proved by the deposition of *Mrs. Ely*, who testified that the money was the produce of certain notes and bonds, placed in the hands of the witness by *Mrs. Taylor* some months before her marriage with *Keister*; and the statements made by *Mrs. Taylor* to the witness, at the time the deposit was made, and to other witnesses, at different times before her second marriage, that those notes and bonds belonged to her daughter.

ter, and had been received for that portion of the estate of the said *William Taylor*, to which the daughter was entitled.

Nov. Term,
1851.

KEISTER
v.
HOWE.

Such being the case, if *Keister* had come into possession of the money, either as administrator of his deceased wife, or otherwise, he also would have held it as a trustee only, and could have been compelled to account for it by a bill in chancery. *Smith v. Calloway*, 7 Blackf. 86. The decree is, therefore, right.

Per Curiam.—The decree is affirmed, with costs.

J. Perry and *J. Yaryan*, for the appellant.

J. S. Reid and *J. S. Newman*, for the appellees.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1852, IN THE THIRTY-SIXTH
YEAR OF THE STATE.

WILLIAMS v. OLIPHANT.

Assumpsit by A. against B. for a breach of contract by the latter, who had agreed to lease to A. a house and small farm, and afterwards refused to let him enter upon or have the premises. At the trial, the defendant asked the Court to instruct the jury, that the rule of damages in the case was the difference between the rent which A. was to pay and the market value of the rent of the premises at the time they were to be delivered to A., and that if the rent to be paid by A. was the highest in the neighborhood, and no greater rent could be had for the premises by A., he was only entitled to nominal damages. The Court refused to give the instruction; but gave the following: "Remote or special damages, such as expenses for removing to a more remote farm, are not to be allowed; but for all such as legitimately and directly arise from the breach, you are to give the plaintiff the equivalent of performance, in money. If the defendant is delinquent or in fault by breaking his contract, he is bound to repair the loss of the plaintiff thereby." *Held*, that the instruction asked by the defendant was correctly refused. *Held*, also, that the instruction given was, so far as it went, substantially correct. The rule as to the measure of damages upon the breach of a contract for the sale of goods, is not applicable to a case like the present.

May Term,
1852.

WILLIAMS
v.
OLIPHANT.

Monday, •
May 24.

APPEAL from the *Franklin* Circuit Court.

SMITH, J.—This was an action of *assumpsit* commenced before a justice of the peace and appealed to the Circuit Court. The cause of action was an alleged breach of contract by *Williams*, who had agreed to lease to *Oliphant* a house and small farm, and afterwards refused to let him enter upon or have the premises. The cause was submitted to a jury, who found for the plaintiff, and assessed his damages at 21 dollars and 25 cents.

Williams, the defendant below, requested the Court to give the following instructions:

“The rule of damages in this case is, the difference between the price of rent to be paid by the plaintiff, and the market price of the article at the time it was to be delivered; and if the rent to be paid by the plaintiff was the highest rent in the neighborhood, and no higher or more rent could be had for the premises by the plaintiff, the latter is only entitled to nominal damages.”

These instructions the Court refused to give, but gave the following:

“Remote or special damages, such as expenses for moving to a more remote farm, are not to be allowed; but for all such as legitimately and directly arise from the breach, you are to give the plaintiff the equivalent of performance, in money. If the defendant is delinquent or in fault by breaking his contract, he is bound to repair the loss of the plaintiff thereby.”

The only errors complained of are, the refusal of the Court to give the instructions requested, and the giving of the charge above quoted.

We think the instructions requested by the appellant were properly refused, and that those given, so far as they go, are substantially correct.

The rule as to the measure of damages in the case of a breach of contract for the sale of goods, when the purchaser can always, or generally, purchase others without inconvenience, is not applicable to the breach of such a contract as that now in question.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

G. Holland, for the appellant.

J. D. Howland, for the appellee.

May Term,
1852.

LYNCH
v.
RALEIGH.

6 2
183 2

LYNCH and Others v. RALEIGH and Others.

A fraudulent conveyance of land made and received for the purpose of preventing its being subjected to the payment of an existing debt, but without any intention to defraud subsequent creditors, will not be set aside, in equity, upon the application of a creditor whose debt was contracted after the deed of conveyance was made and recorded.

Where a fraudulent conveyance of land has been made and received to avoid the payment of an existing debt, with an agreement for a reconveyance upon a repayment of the purchase-money and the expenses of improvements, a creditor of the grantor whose debt was contracted after the deed was made and recorded, if occupying the position of a junior mortgagee or creditor entitled to redeem, cannot institute proceedings for that purpose, after the death of the grantor, unless before his decease he obtained judgment against him, or an administrator has been appointed.

ERROR to the *Vanderburgh* Circuit Court.

SMITH, J.—This was a bill in chancery filed by *Raleigh* and *Byrne* against *Lynch* and the unknown heirs of *Thomas Donohoe*.

Monday,
May 24.

The bill charges that during the years 1847 and 1848, *Donohoe* became indebted to the complainants, by several business transactions, to the amount of about 190 dollars; that in *November*, 1846, *Donohoe* was the owner of a certain tract of land, and being threatened with a suit in which he had reason to believe judgment to a large amount would be recovered against him, and there being a judgment against him on the docket of a justice of the peace which he wished to avoid payment of, he conveyed the land to *Lynch* by a deed which was duly recorded; that said deed was made voluntarily, without consideration, and to prevent the recovery of any judgment which might be rendered against him in said anticipated suit;

May Term,
1852.

LYNCH
v.
RALPH.

and that there was an agreement between the parties that *Lynch* should reconvey the land to *Donohoe*.

It is also alleged that *Donohoe* continued to exercise acts of ownership over the land after the pretended sale, and that he died out of the state in 1848, leaving heirs whose place of residence is unknown. The object of the bill was to have the conveyance to *Lynch* set aside as fraudulent, and the land subjected to the payment of the debts of the complainants.

Lynch answered and denied that the deed was made voluntarily, without consideration. He admits that there was, at the time, a judgment rendered by a justice of the peace against *Donohoe* and in favor of one *Hall*, for 8 cents and some costs; and he also admits that he agreed to reconvey the property to *Donohoe* upon his refunding to him the consideration he paid, and upon his paying him such sums as he should expend in improvements upon the land.

Several depositions were taken, but the only material facts they disclose, in addition to those that may be considered as established by the bill and answer, are, that *Donohoe* did give some directions respecting the cultivation and improvement of the land after the deed had been delivered to *Lynch*, and that both *Donohoe* and *Lynch* had admitted, at various times, that the sale was made with a view to prevent *Hall* from subjecting it to the payment of his judgment. There is no direct evidence as to the consideration of the deed, except the testimony of the subscribing witness, who states in his deposition, that he saw *Lynch* pay *Donohoe* a sum of money at the time the deed was executed, but did not know the amount.

The Court, on the hearing, rendered a decree conformably to the prayer of the bill.

One objection made to the decree is, that it does not appear that the complainants had established their demands by a judgment at law. It may not be necessary for creditors to obtain a judgment before filing a bill to have a fraudulent conveyance set aside, when the debtor is deceased. *O'Brien v. Coulter*, 2 Blackf. 421.

We think, however, the decree is not justified by the facts in evidence. The deed to *Lynch* was made and recorded before the debts of the complainants were contracted, and there is not the slightest evidence that it was made with any view to defraud subsequent creditors. Supposing it to be sufficiently proved that *Lynch* knew *Donohoe's* object in selling to him was to avoid the payment of the costs on *Hall's* judgment, though the land might, perhaps, be subjected to the payment of those costs, it would not follow that the conveyance would be voidable for debts subsequently contracted. See *Abbott v. Hurd*, 7 Blackf. 510.

The decree cannot be sustained on the ground that the conveyance should be considered a mortgage, the complainants occupying the position of junior mortgagees or creditors entitled to redeem, because they could not institute proceedings for that purpose without having previously procured a judgment, or without the appointment of an administrator.

Per Curiam.—The decree is reversed, and the cause remanded, with instructions to the Circuit Court to dismiss the bill.

A. L. Robinson, for the plaintiffs.

J. E. Blythe, for the defendants.

May Term,
1852.

SPANGLER
v.
McDANIEL.

SPANGLER and Another v. McDANIEL.

A. executed a written order directed to *B.* requesting him to pay *C.* a sum specified, when *B.* should collect that amount for *A.* Held, that the order was *prima facie* an acknowledgment that the sum specified was due from *A.* to *C.*

Such an order is assignable, under the R. S. 1843, and can be made the foundation of an action.

The order being, in legal effect, a written acknowledgment of a debt due from *A.* to *C.*, will take the debt out of the operation of the statute of limitations upon unwritten contracts; and a plea, in a suit brought upon the order, that the defendant did not undertake, &c., within six years before the commencement of the suit, is bad.

May Term,
1852.

SPANGLER

v.

McDANIEL.

Assumpsit by C., the payee, against A. upon a written order drawn by A. upon B. for the payment to C. of a specified sum when B. should collect the same for A. The declaration alleged, generally, a presentment of the order, to the executor of B., and his refusal of acceptance and payment, and that B. died before it was presented to him; but did not show when the order was presented for acceptance and payment, nor that notice of the non-acceptance and non-payment had been given; but it averred that, before the presentment, A. had withdrawn his funds from B.'s hands, that none ever came into the hands of his executor, and that A. suffered no loss by the delay of presentment and the want of notice. *Held*, that the declaration was good.

ERROR to the Boone Circuit Court.

Monday,
May 24.

PERKINS, J.—*Charles and George Spangler* brought an action of assumpsit, in 1848, against *William McDaniel*, alleging that said defendant, on the 28th of September, 1835, was indebted to them in the sum of 57 dollars and 50 cents; and that, being so indebted, he, at that date, made an order in writing, directed to one *James A. Dunlap*, and thereby requested him to pay to said plaintiffs said sum above mentioned, when he, the said *Dunlap*, should collect that amount for the defendant, which order was delivered to said plaintiffs; that afterwards, and before said order was presented to said *Dunlap*, he died; that one *Alexander Dunlap* was his executor; that said order was presented to said *Alexander*, who refused acceptance and payment, the said *McDaniel* having withdrawn all his funds from the hands of said *James A. Dunlap* before his death, and none having ever come to the hands of his said executor; and it is averred that *McDaniel* sustained no damage by the want of notice, &c. The defendant pleaded non assumpsit, and non assumpsit within six years. Demurrer to the second plea overruled, and final judgment for the defendant.

The order described in the declaration was, *prima facie*, an acknowledgment that the sum named in it was due from *McDaniel*, the drawer, to the payees, the plaintiffs; it was assignable by our statute, and, hence, was itself the foundation of an action. *Nichols v. Woodruff*, 8 Blackf. 493.

The order, being a written acknowledgment, in legal effect, of a debt due from the drawer, took the debt out

of the operation of the statute of limitations, and the plea setting up that statute was no bar to the action. R. S. p. 686, s. 102. The demurrer to that plea should, therefore, have been sustained.

The declaration does not show when the order was presented for acceptance and payment, nor that notice of non-acceptance and non-payment was given, but it avers that before the presentment, the drawer had withdrawn all his funds from the hands of the drawee, and that he suffered no loss by the delay of presentment and want of notice. Such being the case, the drawer was not discharged from liability by such delay and want of notice, and the declaration is good. This is the rule in cases of checks or orders upon banks, *Hoyt v. Seeley*, 18 Conn. 353; and it must be the same in cases of orders upon private individuals. See Story on Bills, s. 367. The questions as to damage will come up on the trial.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, &c.

J. Morrison and *S. Major*, for the plaintiffs.

L. C. Dougherty, for the defendant.

May Term,
1852.
MADISON INSU-
RANCE COM-
PANY
V.
GRIFFIN.

THE MADISON INSURANCE COMPANY v. GRIFFIN.

The *Madison Insurance Company* rejected the claim of the assured for the loss of the cargo of a flat-boat, and proposed to him to leave the matter to arbitration. The proposition was accepted in writing; whereupon the board of directors entered upon the books of the company a request to the assured to join the secretary of the company in selecting the arbitrators, designating the matter to be referred. The secretary and the assured accordingly selected the arbitrators, and the secretary executed a bond in the terms prescribed by the R. S. 1843, and signed the name and annexed the corporate seal of the company thereto. Held, that the arbitration intended was the statutory one provided by the R. S. 1843. Held, also, that the secretary was empowered by the board to execute and annex the seal of the company to the bond. Held, also, that the submission was a valid one.

A clause in the charter of the company provided that the business of the

May Term,
1852.

MADISON INSU-
RANCE COM-
PANY
V.
GRIFFIN.

company might be carried on without the presence of the board of directors, by the president and secretary, subject to the by-laws, rules, ordinances, and regulations established by the board of directors. *Held*, that the board of directors having made the submission to arbitration, the president and secretary had no authority, under that clause, to revoke the submission.

The award was, that the company should forthwith pay to the assured (naming him) the sum of 750 dollars and 74 cents, and that the same should be received in full satisfaction and discharge of his claim against the company, and that the company should pay the costs. *Held*, that the award was sufficiently certain.

When a party has been represented by his attorney at an arbitration, he cannot afterwards object that notice of the meeting of the arbitrators was not given to him.

The matter submitted to arbitration was, "whether said company was liable to pay the assured the damage done to the flour and meal, or either, on board of said flat-boat, and the amount." The company, at the hearing, applied, upon the affidavit of her agent, for a continuance on account of the absence of three witnesses whose testimony, it was alleged, would tend to show that the damage was less than what the other witnesses had sworn. The arbitrators refused to adjourn the hearing, but proposed to hear the cause, with the exception of the evidence of those witnesses, and adjourn for a reasonable time, to be named by the company's attorney or agent, in order to procure the attendance and testimony of those witnesses; but the company refused a continuance on those terms. *Held*, that the conduct of the arbitrators, in this respect, could not be complained of.

A rule was granted by the Circuit Court upon the company to show cause why judgment should not be rendered on the award of the arbitrators. The company appeared, and filed her reasons, not alleging, as a defense, the want of notice of the award. *Held*, that the notice was thereby admitted.

Monday,
May 24.

APPEAL from the *Jefferson* Circuit Court.

PERKINS, J.—Motion for judgment upon an award. Judgment rendered. The case: The *Madison Insurance Company* executed a policy to *William Griffin* upon the cargo of a flat-boat. *Griffin* claimed compensation for an alleged loss. The board of directors of the company, on the 25th of *October*, 1849, ordered as follows: "The claim *William Griffin* has presented to the office is rejected. The office propose to leave the matter to arbitration." A copy of this "order," as it is called, certified by the secretary, *E. G. Whitney*, as a true copy from the records of the company, was served on *Griffin*. He returned it, indorsed, "I accept the within proposition to arbitrate my

claim against the office. 26th October, 1849. *William Griffin.*"

May Term,
1852.
MADISON INSU-
RANCE COM-
PANY
V.
GRIFFIN.

The board of directors, thereupon, entered upon their books a request to said *Griffin* to join the secretary of the company, said *Whitney*, in selecting the arbitrators, designating the particular matter referred. A copy of this entry upon the books was served by said *Whitney* upon *Griffin*. Arbitrators were accordingly chosen by the secretary and *Griffin*. The secretary executed the bond for the company, containing the names of the arbitrators, &c., and being under the seal of the corporation. The secretary and attorney of the corporation attended at the hearing by the arbitrators, and, near its close, said secretary, with the approbation of the president of the company, executed and served upon the arbitrators an intended revocation of the submission to arbitration. It was disregarded, and an award unanimously made in favor of *Griffin*. The award was filed in the Circuit Court, was proved, as were also the submission to arbitration and notice of the award, and a rule was granted by the Court and was served on the company, to show cause why said award should not be made the judgment of the Court, as was stipulated in the bond of submission it should be. The company, by her attorney, appeared, and, in answer to said rule, insisted that said award should not be made the judgment of the Court, because:

1. There was no notice given to the defendant, the company, of the time and place of meeting of the arbitrators.
2. The arbitrators refused to give time to the defendant to procure the attendance of witnesses, or to ascertain whether her witnesses could be procured.
3. The arbitrators refused to adjourn the hearing on the affidavit of the agent of the defendant.
4. The defendant revoked by bond the said submission before said award was made, or all the evidence heard, and notified said arbitrators thereof.
5. The arbitrators were not authorized by the defendant to hear the controversy and make an award.

May Term,
1852.

MADISON INSU-
RANCE COM-
PANY
V.
GRIFFIN.

6. Said arbitrators acted against the consent and without the authority of said defendant.

7. The submission-bond was not made by defendant.

8. Said award is uncertain, &c.

The plaintiff, *Griffin*, answered, demurring to the eighth, and taking issue upon said several other objections. The issues of law and fact were submitted to the Court for trial. The Court held the eighth objection assigned bad on demurrer, found the remaining seven unsustained by proof, and rendered final judgment on the award for the sum of 750 dollars and 75 cents, and the costs.

We will first consider the fourth, fifth, sixth, and seventh objections to the award. These all go to the validity of the submission or revocation, or both, and raise the two questions, whether there was a legal submission, and whether there was a legal revocation.

There is no doubt, on the extracts above given from the books of the company, that there was a valid and closed agreement between the company and *Griffin* to submit the matter in controversy to arbitration. The arbitration intended in that agreement, we understand, as evidently did the parties, to be the statutory one. Our R. S., s. 3, p. 787, enact that, when an agreement for such an arbitration has been entered into, "the parties shall enter into bonds, duly executed, sealed, and delivered, with conditions to abide and faithfully perform the award or umpirage, specifying in such bonds the name or names of the arbitrator or arbitrators, and the matter or matters submitted," &c. Under this statute, the agreement of the corporation to submit to arbitration included an agreement to give a bond containing the names of the arbitrators, &c., it being a necessary part of such submission. Such a bond was executed under the seal of the corporation by her secretary, in this case; and there is no doubt that the submission was valid, if the secretary was authorized to execute said bond. There was no order to him, in literal terms, from the board of directors, to execute it; nor was there, says the secretary in his testimony, any by-law making it his duty to do it. He says he was

accustomed to execute the orders of said board when directed. But here was an agreement by the corporation to arbitrate and give bond. That bond was necessarily to be executed by an agent. The secretary would properly be that agent. The names of the arbitrators, and the matters to be determined, were, by law, to appear in that bond. The corporation did expressly empower the secretary to agree with the opposite party upon the names, and designate to him the particular matter to be specified in said bond; and we think it was intended to confer upon him the power necessary to complete the submission to arbitration, including the execution of the bond, and so the secretary understood it. We think a valid submission was made.

We do not think there was a valid revocation of that submission. The agreement to submit was made by the corporation itself—at least, by its directors—and not by the secretary, or president, or both. The secretary, to carry into effect that agreement, executed under, as we have held, a special authority from the company, the submission-bond. He was not specially authorized to do more. He was not empowered to revoke the submission which the corporation, by its directors, had agreed to make. Indeed, the secretary did not undertake, of his own authority, to do it. The attempted revocation was by him, under the sanction of the president, without, however, any authority from the directors. There was no by-law conferring the power to act upon the president and secretary. The charter of the company, which is a public act, says that “the business of the corporation may be carried on without the presence of the board of directors by the president and secretary, subject, nevertheless, to the by-laws, rules, ordinances, and regulations established by the board of directors.” By virtue of this clause in the charter, had the board not assumed to act at all in the matter in question, but left it to “be carried on without their presence,” in the language of said clause, by the president and secretary, perhaps these officers

May Term,
1852.
MADISON INSU-
RANCE COM-
PANY
V.
GRIFFIN.

May Term,
1852.
MADISON INSU-
RANCE COM-
PANY
V.
GRIFFIN.

might, though we do not so decide, had they thought proper to do it, in the first instance, have referred the matter to arbitration; and, had they done so, might have revoked their own submission. But the board of directors is paramount in authority to the president and secretary; and it seems to us, as that board had, in fact, made the submission, it was not competent for the president and secretary, by virtue of their own authority, to revoke that submission, and subject the company to the consequences that might follow. A submission should be revoked by an authority equal to that which makes it. We conclude, then, that the award was made by the authority and consent of the insurance company.

The eighth objection, viz., that the award is uncertain, cannot be sustained. The award is, that "the company shall forthwith pay to said *William Griffin* the sum of 750 dollars and 74 cents, and the same shall be received by him in full satisfaction and discharge of his claim against said company," and that the company shall pay the costs.

The first objection, viz., that notice of the meeting of the arbitrators was not given, is immaterial, as both parties were represented by their attorneys at the meeting.

The second and third objections relate to the continuance asked, and will be considered together.

The matter submitted to arbitration was "the simple question, whether said company is liable to pay said *Griffin* the damage done to the flour and meal, or either, on board of said flat-boat, and the amount."

The application for a continuance was on account of the absence of three witnesses, viz., one *Carpenter, Joseph Broad*, and *Jacob McConnell*. *Carpenter* had examined the flour and meal with reference to the damage done them, and it was believed he would not put it as high as 15 per cent. *Broad* and *McConnell* used 600 or more barrels of the meal, and it was believed they would not put the damage done it to 10 per cent.

The object of the continuance was, then, simply to obtain the opinions of three witnesses as to the per cent. of

damage done to the articles named, and not to procure proof going to show that the company was not liable at all on the policy.

May Term,
1852.
MADISON INSU-
RANCE COM-
PANY
V.
GRIFFIN.

The arbitrators offered to hear the case with the exception of those witnesses, and adjourn for a reasonable time, to be named by the attorney or agent of the company, in order that said absent witnesses might be brought before them and heard before the award was made. The continuance on these terms was refused. We think, considering the character and quantity of the testimony expected from the absent witnesses, the proposition was a fair one, and should have been accepted, if the party really wished to obtain the absent testimony; and that she cannot complain of the conduct of the arbitrators in proceeding after her refusal to accept it. We need not examine, therefore, into the other circumstances of the case, which, perhaps, might have justified a refusal to continue.

The defendant, in the Circuit Court, also objected, at the hearing there, that it was not proved that notice of the award was given her. When the plaintiff filed the award in the Circuit Court, he proved, *ex parte*, as the record showed, that a copy of the award had been served on the defendant. A rule was then granted upon her to show cause why judgment should not be rendered on the award. She appeared and filed her reasons, and on them the issues were formed and tried. Want of notice of the award was not alleged as a ground of defense, and notice was, therefore, admitted by the pleadings.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

J. G. Marshall, for the appellant.

W. M. Dunn, *J. W. Chapman*, and *S. Major*, for the appellee.

May Term,
1852.

CONKLIN v. SMITH.

CONKLIN
v.
SMITH.

Money due to the plaintiff, and improperly received by the defendant, cannot be recovered in an action for money paid.

Money paid to the defendant under a mistake of facts, cannot be recovered under a count for money paid. The proper form of action is for money had and received.

To sustain a count for money paid, there must have been a payment of money by the plaintiff to a *third party*, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount.

Monday,
May 24.

ERROR to the *Wayne* Circuit Court.

BLACKFORD, J.—*Smith* brought an action of assumpsit against *Conklin*. The declaration contains but one count, and that is a general one for money paid, laid out, and expended.

Pleas, the general issue, a set-off, and the statute of limitations. Replications to the last two pleas, and issues.

The cause was submitted to the Court, and judgment rendered for the plaintiff.

There was evidence tending to prove that certain rent due to *Smith*, the plaintiff, from a tenant who had occupied certain real estate of *Smith's*, had been improperly received from the tenant by *Conklin*, the defendant. But if it be admitted that *Smith* has a legal claim against *Conklin* for the money received by *Conklin*, it cannot be recovered in this action for money paid. The proper form of action in such case would be for money had and received.

The plaintiff contends that there is evidence tending to show that he paid money to the defendant under a mistake of facts. But if there is such evidence, it only tends to show the plaintiff's right to recover under a count for money had and received—not for money paid.

To sustain a count for money paid, laid out, and expended, there must have been a payment of money by the plaintiff to a *third party*, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount. 2 Saunders' Plead. and Evidence, 402.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, with leave to the plaintiff to amend his declaration.

J. Rariden and S. W. Parker, for the plaintiff.

J. S. Newman, for the defendant.

May Term
1852.

MORGAN
v.
LAWRENCE-
BURGH INSU-
RANCE COM-
PANY.

2c 285
165 215

MORGAN v. THE LAWRENCEBURGH INSURANCE COMPANY.

In a suit brought by a corporation, a plea that, at the commencement of the suit, there was no such corporation in existence as the plaintiffs, is substantially good.

A declaration against one of several makers of a joint and several promissory note, need not notice that the other makers executed the note.

ERROR to the Dearborn Circuit Court.

Monday,
May 24.

BLACKFORD, J.—The *Lawrenceburgh Insurance Company* brought an action of assumpsit against *Andrew Morgan*. The declaration contains five counts. The first four counts are upon promissory notes payable to said company; each count describing a different note alleged to have been executed by the defendant. The fifth count is for money lent and money had and received.

There were two pleas: First, That there was not, at the time the suit was commenced, any such corporation in existence as the plaintiffs.

That plea was demurred to generally and the demurrer was sustained.

The second plea was non assumpsit. Issue thereon.

The issue of fact was submitted to the Court, and judgment rendered for the plaintiffs.

We think the first plea is substantially good. If the plaintiffs were not a corporation when they commenced the suit, they must fail. This point is decided in the case of *The Guaga Iron Company v. Dawson*, 4 Blackf. 202. If, by a person's giving a note to a party as a corporation, he is prevented from denying that, when the note was given, there was such a corporation, that is no reason that he should not allege that it did not exist when the suit was commenced. The act of incorporation may,

May Term,
1852.

CHEEK
v.
GLASS.

before the commencement of the suit, have expired by its own limitation.

On the trial of the issue of fact, the notes described in the declaration were objected to on the ground of variance; but the objection was overruled. No variance is pointed out in the assignment of errors; and we have not discovered any. The notes appear to have been executed by the defendant and one *Swift*; but as they are joint and several, it was not necessary that the declaration, in describing the notes, should notice that *Swift* had executed them. They were the several notes of the defendant, and could be declared on as if he alone had signed them. *Chitty on Bills*, 9th Amer. Ed. 581. *Mountstephen v. Brooke*, 1 Barn. and Ald. 224.

The judgment for the plaintiffs must be reversed, because the demurrer to the first plea was wrongly sustained.

Per Curiam.—The judgment is reversed, with costs. Cause remanded, with leave to the plaintiffs to reply to the first plea.

J. Sullivan, D. S. Major, and A. Brower, for the plaintiff.

D. Macy and S. H. Spooner, for the defendants.

CHEEK and Others v. GLASS.

When the general issue and special pleas are filed to the action, and the defense set up in the special pleas is admissible under the general issue, it will not be examined on error whether demurrers to the special pleas were properly sustained or not.

To an action by the assignee against the makers of a promissory note, being principal and sureties, the defense was that, after the note became due, and before the assignment, the time of payment was extended by agreement between the principal and payee, without the consent or knowledge of the sureties. The only evidence of such extension was three indorsements made upon the note by the payee, after it became due, each a year apart from the other, to the effect that he had, at the date of the indorsements severally, received the interest for a year in advance, and the note was to stand, without suit, to the end of the year. *Held*, that it did not appear that the time of payment was extended by agree

ment made by the payee with the principal, nor that the interest might not have been paid by either or all of the makers.

May Term,
1852.

ERROR to the *Dearborn* Circuit Court.

CHEEK
v.
GLASS.

SMITH, J.—Assumpsit by *Glass* against *Cheek*, *Dumont*, and *Glenn*, upon two promissory notes made by the defendants in favor of one *Hurlbut*, and assigned by the latter to the plaintiff. The notes were dated the 11th of *May*, 1839, one being payable six years and one seven years after date.

Tuesday,
May 25.

Cheek made no defense. *Dumont* and *Glenn* pleaded the general issue, and seven special pleas.

All the special pleas averred that *Dumont* and *Glenn* executed the notes as the sureties of *Cheek*, and that after they became due, and before they were assigned to the plaintiff, the time of payment was extended from year to year for two or three years, pursuant to an agreement between *Cheek* and *Hurlbut*, and made without the knowledge or consent of *Dumont* and *Glenn*, in consideration of the payment of interest in advance by *Cheek*.

Some of the pleas aver that interest at the legal rates was thus paid in advance, others, that usurious interest was paid and received. Some of them were pleaded in bar of the suit, and some to the interest and costs only. In other respects the pleas were substantially alike.

Demurrers were sustained to the second, fifth, and sixth pleas. The plaintiff replied to the third, fourth, seventh, and eighth, denying that there was any such agreement between *Cheek* and *Hurlbut* as was therein alleged.

The cause was, by agreement of the parties, submitted to the Court for trial upon the issues joined, and the plaintiff obtained a judgment for 143 dollars and 54 cents.

The only evidence introduced upon the trial consisted of the notes sued upon, and the indorsements upon them.

The indorsements upon the note payable six years after date were as follows:

"I, *Samuel Hurlbut*, do hereby agree that the within note shall stand, without suit, until the 11th of *May*, 1846, and acknowledge the receipt of the interest up to that time. *May* 15th, 1845. *Samuel Hurlbut*."

May Term,
1852.

CHEEK
v.
GLASS.

"Received the interest in full on this note up to the 11th of May, 1847, and agreed said note to stand, without suit, until that time. *Samuel Hurlbut.*"

"This note to stand, without suit, until the 11th of May, 1848, the interest having been paid up to that time. *Samuel Hurlbut.*"

"Value received, I assign this note to *John Glass*. May 26th, 1848. *Samuel Hurlbut.*"

There were similar indorsements upon the other note.

It is contended that the Court erred in sustaining the demurrers to the second, fifth, and sixth pleas, but we do not think it necessary to examine whether those pleas presented a sufficient defense, as all the evidence which they could have authorized was admissible under the general issue (1).

The evidence given upon the trial, however, does not show that *Glenn* and *Dumont* were sureties; and if, in a suit upon a note where all appear to be principals, a defense of this kind may be set up and proved, it was not done in this case.

It is true, the plaintiffs in error contend, that it stands admitted of record that *Glenn* and *Dumont* are merely sureties, because there is such an averment in some of the pleas upon which issue was taken, and it was not denied by the replications. But supposing the suretyship to be admitted, there is no proof of an agreement to extend the time of payment, as alleged in the pleas, and in order to discharge the sureties it should, at least, be made to appear that the agreement for the delay was made by the payee with the principal. The indorsements upon the notes do not show this, for they do not state who paid the interest receipted for, and, for anything that appears, it may have been paid by any or all the makers of the notes.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

E. Dumont, for the plaintiffs.

D. Macy, J. Morrison, and *S. Major*, for the defendant.

(1) See *Carter v. Thomas*, ante, p. 213, and note.

JARVIS v. SUTTON.

May Term,
1852.

JARVIS
v.
SUTTON.
3 280
135 668

A. agreed orally with B. to sell B. his farm for a price specified, conditionally, as follows: A. was to go to *Iowa* to look at the country, and B. was to furnish him with a specified number of land-warrants, when he was ready to start. A. was to put B. in possession of certain fields, forthwith, which B. intended to plant with corn, and was to allow B. to stable his horses in the barn while he was cultivating the corn. If A. liked *Iowa* when he got there, B. was to keep the farm at the price agreed upon, and, in that event, was to pay A. 2 dollars an acre for two fields of wheat on the farm; but if A. did not like *Iowa*, there was to be no sale of the farm, and B. was to pay him rent for the corn-ground at the rate of 2 dollars an acre. Pursuant to the agreement, A. gave to B. possession of said fields which were to be put in corn, which B. plowed and planted, stabling his horses in the barn while doing so. Held, that there was no valid contract for the sale of the land. Held, also, that the agreement between the parties amounted merely to a lease of the corn-ground.

After the making of said contract, A. agreed orally with B. to give him the rent of the corn-ground, and the wheat in a wheat-field on the premises, if he would relinquish his purchase, A. at the same time pointing to the field. B., afterwards, pursuant to the agreement, did so, and cut and carried away the wheat in said field. Held, that the agreement of A. was without consideration, and that B. was liable for the value of the wheat, upon a count for goods sold and delivered.

A promise to give something for the compromise of a claim, about which there is merely a dispute and controversy, and which is without legal foundation, will not sustain a suit at law.

ERROR to the *Parke* Circuit Court.

Tuesday,
May 25.

SMITH, J.—This was an action of assumpsit, brought by Sutton against Jarvis for goods sold and delivered. Plea, the general issue, with an agreement that all matters of defense which might be specially pleaded, might be given in evidence under this plea. Verdict and judgment for the plaintiff for 79 dollars and 15 cents, a motion for a new trial having been overruled.

The error assigned is that the judgment is not warranted by the evidence.

The plaintiff proved that, in the fall of 1849, he put two fields on his farm in wheat; one of which fields contained about eight, and the other about twelve acres; that the wheat upon the eight acre field was worth about the sum for which the judgment was rendered; and that

May Term,
1852.

JARVIS
v.
SUTTON.

it was cut and taken away by the defendant who appropriated it to his own use.

The defendant then introduced witnesses who testified that, in the month of *February*, before the wheat was harvested, the plaintiff and defendant made a verbal contract to the following effect: The plaintiff conditionally sold his farm, comprising 240 acres, to the defendant for 14 dollars per acre. *Sutton* was to go to *Iowa* in *May* following to look at the country. The defendant was to furnish the plaintiff with five land-warrants, and seven if he wished them, when he was ready to start to *Iowa*. The plaintiff was to put the defendant in possession of certain fields, containing about 54 acres, forthwith, which the latter designed to plant with corn, and was to allow him to stable his horses in the barn while he was cultivating the corn. If the plaintiff liked *Iowa*, when he went there, the defendant was to keep the farm at the price agreed upon, and, in that event, he was to pay the plaintiff 2 dollars per acre for all the wheat, including both the fields before mentioned. But if the plaintiff did not like *Iowa*, there was to be no sale of the farm, and the defendant was to pay him rent for the corn-ground at the rate of 2 dollars per acre.

The defendant also proved that, in pursuance of this agreement, the plaintiff gave him possession of the fields to put in corn, which he plowed and planted, stabling his horses in the barn while doing so.

He then introduced witnesses who stated that, in the month of *April*, *Martin* and *Silas Dooly*, being desirous of purchasing a farm for their nephew, went to look at the farm of the plaintiff, being the same farm before referred to. They first saw the defendant who explained to them his contract with the plaintiff. They then went to see the plaintiff and informed him that they desired to purchase the place. The plaintiff told them he had sold it to the defendant and could not sell it to them, but if they would wait until his return from *Iowa*, if he should not like that country, he would have the right to sell, and intimated that it would be easy for him to be dissatisfied,

if he should be paid for being so. The *Doolys* proposed to the plaintiff to buy out the defendant's right, and sell to their nephew immediately, as he would not wait. The plaintiff then told them to go to the defendant and propose to him that if he would give up his right to the farm, the plaintiff would give him the rent of the corn-ground. The *Doolys* went to the defendant and stated the plaintiff's proposition, which the defendant refused to accede to. They offered him 100 dollars in money if he would sell his right to the farm, which he also declined. They then proposed to him to go with them to the plaintiff and try to arrange the matter, which he did. When the parties met for this purpose, the plaintiff, after some discussion, proposed to the defendant to give him the rent of the corn-ground and the eight acre field of wheat, if he would agree to cancel the contract for the sale of the farm, which the defendant consented to take, and they accordingly closed on those terms, the field of wheat being then pointed out by the plaintiff, and the wheat being the same for which this suit was brought.

May Term,
1852.

JARVIS
v.
SUTTON.

After this last agreement the *Doolys* bought the farm from the plaintiff, giving him a higher price for it than the defendant had agreed to give. About the time the wheat was cut, a dispute arose between the plaintiff and the defendant, each threatening to sue the other if he should take the wheat, and finally the defendant took the wheat away at a time when the plaintiff was absent from home.

All this evidence relative to the verbal contract for a conditional sale of the farm, and to the rescission of that contract, was objected to by the plaintiff and excluded by the Court.

We are of opinion that the judgment is right, and that if all this evidence had been admitted it could not have varied the result. The contract verbally made between the plaintiff and defendant amounted merely to a lease of the 54 acres of corn-ground. There was no contract for the sale of the farm which *Jarvis* could have enforced. There was, therefore, no contract of sale to rescind, and

May Term,
1852.

JARVIS
v.
SUTTON.

no possession of the farm to surrender, for *Jarvis* never had possession of any part of the farm but the fields he was to cultivate in corn. The lease of the corn-ground does not appear to have been rescinded, nor the possession of that part of the farm to have been given up. On the contrary, *Jarvis* appears to have cultivated the corn pursuant to his lease. We are, consequently, unable to perceive any consideration whatever for the alleged agreement to give him the wheat in question.

The circumstances do not authorize the conclusion that the eight acres of wheat was a *gift* to the defendant, because there was no actual delivery. The mere pointing out of an article does not constitute a delivery. If I point to a horse running in my field and tell another person he may have him, this would not preclude me from preventing such person from taking actual possession.

Neither does this evidence show that there was any compromise which would be a sufficient consideration. It is true a compromise of doubtful claims may be sufficient to found a consideration upon, but in such cases there must be a surrender of some legal benefit which the other party might have retained. In other words, there must be some consideration for a compromise, as well as for any other contract, if it is unexecuted and remains to be enforced. A promise to give something for the compromise of a claim, about which there is merely a dispute and controversy, and for which there is no legal foundation whatever, is not sufficient to sustain a suit at law. See *Wade v. Simcon*, 2 Mann. Gr. and Scott, 548.—*Edwards v. Baugh*, 11 M. and W. 641.

Per Curiam.—The judgment is affirmed, with 2 per cent. damages and costs.

E. W. McGaughey and *A. L. Roache*, for the plaintiff.
S. F. Maxwell, for the defendant.

LUMM v. THE STATE.

May Term,
1852.LUMM
v.
THE STATE.

A prisoner who has applied for a writ of *habeas corpus* to be let to bail, may, upon the refusal of the judge to allow him to give bail, prosecute a writ of error from such judgment to the Supreme Court.

The judge, hearing such application, may, under the R. S. 1843, cause notice to be given to the party interested in resisting it, or his attorney, and witnesses to be summoned to testify in the premises; and may fully investigate the case.

A prisoner indicted for murder in the first degree, may sue out a writ of *habeas corpus* to be let to bail, and upon proof that he is guilty of a bailable homicide, he should be allowed to give bail.

ERROR to the judgment of Hon. *Alvin P. Hovey* in *Tuesday,*
Vanderburgh county. *May 25.*

PERKINS, J.—*John W. Lumm* presented his petition to the president judge of the fourth judicial circuit, in vacation, setting forth that he was imprisoned in the jail of *Vanderburgh* county, for the want of bail, upon a charge of murder in the first degree, preferred by indictment in the *Vanderburgh* Circuit Court, at the last term thereof, begun and held, &c.; and praying a writ of *habeas corpus* to enable him to give bail. The writ was ordered, and was issued to the sheriff, requiring him to bring the body of *Lumm* before the judge, on a day and at a place specified, with the cause of his detention. On the day and at the place fixed, the sheriff appeared, having the body of *Lumm*, and returned as the cause of his detention the indictment referred to in the petition, consisting of a single count, charging murder in the first degree, and also a *mittimus*, directed to the keeper of the jail by the recorder of *Evansville*, *ex officio* a justice of the peace in said county, before whom said *Lumm* had been brought and adjudged guilty prior to the meeting of the grand jury which indicted him; and thereupon said *Lumm*, by his counsel, asked the judge to let him to bail, and offered to adduce proof that the grade of offense of which he was really guilty was bailable; but the prosecuting attorney objected to the adducing of such proof, and the judge sustained the objection, and remanded the prisoner into custody. The

May Term,
1852.

LUMM
v.
THE STATE.

prisoner brings the case to this Court, as he has a right to do; *Sherry v. Winton*, Smith's R. 1 (1); and contends, not that the offense of murder in the first degree is bailable, but that he is not guilty of that offense, though so presented by the grand jury, and that he had a right to go behind the indictment found by that body on the hearing upon the writ of *habeas corpus*, and prove to the judge that the offense of which he is guilty is of an inferior grade—a grade that is bailable; and that upon making such proof he was entitled to be let to bail.

The decision of the judge below was in accordance with the *English* authorities. The judges in that country do not go behind the indictment on applications of this character; not, it would seem, from an opinion of the impropriety of so doing, but from a want of power. They say the evidence before the grand jury is secret, and to be kept secret, and that, hence, they cannot avail themselves of the means of judging of the case. Where a party is committed upon a criminal charge, otherwise than upon an indictment, they re-examine the case upon *habeas corpus*, and remand or let to bail as is judged right. 3 Petersdorff, 307.—1 Chit. Cr. L. 129. The decision below must, therefore, be affirmed, unless our statute has changed the *English* rule in this state.

Our statute contemplates two kinds of applications for the writ of *habeas corpus*. One in which the petitioner claims to be absolutely discharged from custody on the ground that his arrest and detention were originally, or have become subsequently, entirely illegal; the other, where he admits the legality of the arrest and detention but claims the right to give bail for his appearance to meet the charges upon which the arrest and detention are, and not to be absolutely discharged; but, in both kinds, we think the statute authorizes the judge hearing the application to cause notice to be given to the party interested in resisting it, or his attorney; sections 28, 29, 30, p. 932; to summon witnesses to testify in the premises; section 17, p. 930; and fully to investigate the case. See

the provisions of the *habeas corpus* act generally; R. S. p. 927. Such being the fact, the objection of the *English* judges that they cannot get at the evidence necessary to the correct understanding of the case, does not apply here; for, though the evidence given to the grand jury cannot be laid before the judge, yet the witnesses themselves can be summoned and examined by him; and we the more readily give the construction we have adopted to our statute, as we think it will be attended with no objectionable, but with actually desirable, consequences. The only objection, so far as we see, that can be raised to it, is, that such power cannot be safely conferred on the circuit judges. But it seems to us it may be committed to them without danger.

May Term,
1852.

LUMPKIN
V.
THE STATE.

On the other hand, indictments are found upon *ex parte* testimony, and, hence, often, upon an incorrect understanding of the case; and further, upon an indictment for murder in the first degree, the accused may be convicted of murder in the first, or in the second, degree, or of manslaughter. *The State v. Kennedy*, 7 Blackf. 233. An indictment for murder in the first degree is, therefore, in reality, an indictment for some one of three offenses, upon either of which the defendant may, according to the evidence, be convicted. Prosecuting attorneys are, consequently, tempted, as a matter of policy, to draw their indictments covering the highest offense—thus including the inferior—rather than for either of the lower, which does not include the superior. The indictment, therefore, should not be taken as conclusive of the grade of offense, in determining the question of bail.

After a party was indicted for a crime of which the Court had jurisdiction, a judge could not, of course, wholly discharge him, for he would be bound to answer to the indictment. He could only permit him to give bail for his appearance for trial. Nor, we may remark, would the opinion of the judge, on the hearing of the *habeas corpus* application, as to the character of the crime, be a matter to come before the Court or jury on the trial upon the indictment.

May Term, 1852. *Per Curiam*.—The judgment is reversed. Cause re-manded, &c.

SPEARS
v.
CLARK. *J. G. Jones and J. E. Blythe, for the plaintiff.*
A. L. Robinson, for the defendant.

(1) 1 Carter's Ind. R. 96.

20
165 164

SPEARS v. CLARK.

In a suit upon the assignment of a promissory note, the assignor will not be held to be discharged by the *laches* of the assignee, if, upon a judgment obtained against the maker in due time, the issuing of an execution was only delayed until a reasonable time had elapsed after the adjournment of the Court at which judgment was rendered; unless some special cause is shown which made it the duty of the assignee, as an act of good faith, to have it issued earlier.

In a suit upon the assignment of a promissory note, the evidence was that the term of the Court at which the plaintiff obtained judgment against the maker was adjourned on the 7th of *September*, and that a *fi. fa.* issued on the judgment on the 21st of that month. *Held*, in the absence of proof of any loss by the delay, that the plaintiff exercised sufficient diligence in taking out execution.

A promissory note was dated at *Lafayette*, but the assignments on it were not dated as of any place. Suit was prosecuted and judgment obtained against the makers at that place. Suit was also commenced against the defendant, one of the assignors, and process served on him at that place. There was also proof that several of the parties resided there. *Held*, that the averment in the declaration on the assignment of the note, that it was assigned at *Lafayette*, was presumptively established.

Where, in a suit by the assignee against the assignor of a promissory note, the former shows that he has used due diligence in prosecuting the maker to insolvency, it is not incumbent on the plaintiff to prove that the maker continued insolvent till the commencement of the suit.

A note, the assignment of which was sued on, was signed as follows: *S. T.; T. and S.* The declaration averred that *S. T.*, and *T.* of the firm of *T. and S.*, were the same person. The record of a suit by the assignee against *T. and S.* on the note, alleging that they were the persons who made the note, was in evidence at the trial, and *T.* having been examined as a witness, spoke, in his testimony, of *S.* and himself, the defendants in the judgment, as the makers of the note, and mentioned no other person. *Held*, that the averment was sufficiently proved.

Tuesday,
May 25.

APPEAL from the *Tippecanoe* Circuit Court.

PERKINS, J.—Assumpsit by the assignee against the

assignor of a promissory note. Plea, the general issue. Judgment for the plaintiff. The evidence is upon the record.

May Term,
1852.

SPEARS
v.
CLARK.

The first point made in this Court is, that due diligence was not used in attempting to recover the money from the makers of the note.

It appears that judgment was obtained against them at the August term, 1839, of the *Tippecanoe* Circuit Court, which was the first term after the assignment of the note to the plaintiff. That assignment, we should remark, is without date; and the appellant, the defendant below, contends that one or more terms of the Court intervened between the assignment and the judgment against the makers. But the evidence to the fact that the judgment was recovered at the first term after the assignment, is as strong now as it was when the cause was before this Court in 1844; and it was then held sufficient to justify the jury in so finding. *Spears v. Clark*, 7 Blackf. 283. It further appears that said August term at which the judgment against the makers was obtained, was not adjourned until the 7th of September following; that, on the 21st of said September, a *fieri facias* on the judgment was sued out of the clerk's office, and, on the 24th of said month, was placed, by the clerk, in the hands of the sheriff of the county, who returned the same, "no goods or chattels, lands or tenements," &c., and that there were on the docket of the Court, at said August term, 371 causes. Samuel Hoover, the clerk, testified, that he thought the costs could not have been taxed and the executions issued on all the judgments rendered at said term before the 21st of September, 1839; that he was in the habit of issuing executions in the order in which *præcipes* for them were filed, and was also in the habit of consulting the order in which judgments were rendered; and he would have issued an execution on the judgment against the makers of the note in question on the day said judgment was rendered, had he been required to do so, but thought no *præcipe* for an execution had ever been filed. It was proved that an execution, had it been issued on the day

May Term,
1852.

SPEARS
v.
CLARK.

of the adjournment of said *August* term of the Court, on the judgment against the makers of the note, would have been unavailing, as they then had no property subject to it. Such was, substantially, the evidence in regard to diligence.

It is contended that in a suit by the assignee against the makers of a note, due diligence requires that an execution should be issued on the judgment against them as soon, at least, as the day following the rendition, whether that day fall in term-time or vacation.

All the decisions of this Court bearing upon the subject, are to the contrary of this proposition, and they are sufficiently numerous to settle the rule upon authority. That rule is, that execution in such cases may be delayed till a reasonable time for the issuing of execution has elapsed after the adjournment of the term of the Court at which judgment is rendered, unless some special cause be shown to exist, making it the duty of the party, as an act of good faith, to issue it earlier. For example: If the assignor could show that the maker was about to put his property beyond the reach of execution, or to become insolvent, and that he had notified the assignee of the fact, or that he otherwise knew it, and that said assignee had, nevertheless, neglected to apply for the issuing of an execution, whereby the judgment that otherwise could have been collected, had been lost, he would establish a want of due diligence in that case. We may properly notice some of the decisions from which the foregoing proposition is deduced: In *Hanna v. Pegg*, 1 Blackf. 181, "a *feri facias* was issued within a few days after the term in which the judgment was rendered;" and it was held, *prima facie*, sufficient diligence. In *Bishop v. Yeazle*, 6 id. 127, execution was delayed over six months, and it was held that, unexplained, it was unwarrantable negligence. In *Dorsey v. Hadlock*, 7 id. 113, judgment was rendered on the 25th of *April*, and execution was issued on the 18th of *May* following, and it was held that, *prima facie*, due diligence was shown. When the term closed does not appear. *Clark v. Spears*, 8 id. 302, was the pre-

sent case, then before the Court on demurrer to the declaration. The facts then alleged in the declaration were substantially those now proved on the trial below, and set out above in this opinion, and they were held to show, *prima facie*, due diligence. The Court remarked: "If the defendant can show [on a trial] that he sustained a loss by the delay in the issuing of the execution, he will have the right to do so." He failed, on the trial, to show that he had sustained loss by such delay. In *Nance v. Dunlavy*, 7 id. 172, judgment was rendered on the 15th of March, and it was "held that the assignee could not, during that month, be charged by the assignor with *laches* for not having taken out execution."

Black v. Wilson, 7 id. 532, is supposed to be in conflict with these cases, but it is not. In that case, no suit had been instituted against the maker of the note. The question, therefore, of diligence in the prosecution of a suit could not arise. And where the assignee assumes to dispense with a suit against the maker, he is bound to prove insolvency in the maker to an extent that would render a suit wholly unavailing for the recovery of any part of the debt. *Hardesty v. Kinworthy*, 8 id. 304. It was held, in *Black v. Wilson*, that such insolvency was not shown in that case.

It is next objected that the allegation in the declaration that the note was assigned at *Lafayette*, was not proved. If it was necessary that that allegation should be proved, we think it was sufficiently done. The note is dated at *Lafayette*. The assignments on it are not dated as of any place. The suit and judgment against the makers were at *Lafayette*. The suit against the indorser and service of process on him were at that place, and the testimony positively shows that several of the parties resided there. We think the presumption was raised that the indorsements were made at that place. At all events, the assignments were given in evidence on the trial, without objection to them particularly pointed out; and, at that time, the rule of decision was, that unless particular objections were specified, the case stood as if

May Term,
1852.

SPEARS
v.
CLARK.

May Term,
1852.

SPEARS
v.
CLARK.

no objection was made. This rule is decisive of the point under consideration.

The next point made is, that the insolvency of the makers was not sufficiently established. A return against said makers of no property, was made on the 24th of September, 1839, and this suit was commenced against the assignor on the 9th of March, 1843. It is contended that said makers should have proved to be insolvent when this suit was commenced. We think the plaintiff in the Circuit Court, having shown that he had used due diligence by prosecuting the makers of the note to insolvency, was not bound to prove that they continued insolvent to the time of suing his assignor. Whether the assignor could have shown, in bar of the suit, that the makers had acquired property subsequently to the return against them of no property, we need not stop now to ascertain.

The note, an indorsement of which is sued on, is as follows:

"*Lafayette, April 16, 1838. Seven months after date, I promise to pay to the order of George M. Marshall, five hundred dollars, for value received. Samuel Taylor, Taylor and Smith.*"

The declaration avers that *Samuel Taylor*, and *Taylor* of the firm of *Taylor and Smith*, were one and the same person; and it is urged that that averment was not proved. If it was necessary, under the issue, that it should have been, we think it was done. The record of the suit and judgment at law against said *Samuel Taylor* and said *Smith*, charging them as being the persons who made the note, was in evidence; and *Taylor* himself was examined as a witness, and spoke, in his testimony, of *Smith* and himself, the defendants in said judgment, as the makers of the note, and mentioned no other person. This was sufficient.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

Z. Baird and J. M. Reynolds, for the appellant.

R. A. Chandler, for the appellee.

WEST v. CHASE.

May Term,
1852.WEST
v.
CHASE.

A purchaser of land, whose deed is to be made upon the payment of several notes given for the purchase-money, cannot maintain a bill, filed after all the notes have become due, to enforce the execution of the deed, without showing a payment of all the notes, or a proper offer to pay them, or something equivalent.

A. contracted with B. to sell to him a lot in *Elkhart* county, for a certain sum in potter's ware, for the payment of which sum five notes were given. The contract was made in said county, where B. resided; but A. then, and when this suit was brought, resided in *Illinois*. The first three notes were paid to A. when they became due. When the last two severally became due, B. set apart at his manufactory, in said county, where he carried on the business of manufacturing potter's ware, a sufficient quantity of potter's ware to pay them. He, afterwards, filed his bill to compel A. to execute to him a deed, but did not aver or prove a demand of the deed. *Held*, that by setting apart the potter's ware as stated, it became the property of A., and the notes were thereby paid. *Held*, also, that A.'s absence from the state was a sufficient excuse for B.'s not demanding a deed, had the demand been otherwise necessary.

ERROR to the *Elkhart* Circuit Court.Tuesday,
May 25.

BLACKFORD, J.—This was a bill in chancery, filed in the *Elkhart* Circuit Court in *August*, 1844, by *Chase* against *West*.

The bill states that *West*, on the 7th of *December*, 1842, contracted to sell to *Chase* lot No. 66, in *Elkhart*, for 250 dollars in potter's ware, for the payment of which sum five notes of 50 dollars each were given; that the note first due was payable on the 1st of *March*, 1843, and the one last due was payable on the 1st of *March*, 1844; that *West* was to make the deed by the 1st of *March*, 1843, by *Chase's* making him a mortgage to secure the notes.

The bill further states that the three notes first due were paid; that when the other two fell due, the complainant had the ware ready to deliver in payment of them; that he has always been, and still is, ready to deliver the ware; that said ware, sufficient to discharge said two notes, was set apart and designated for the payment thereof, by the complainant, who was ready and willing to deliver the same to *West*, but no person came to receive

May Term,
1852.

WEST
v.
CHASE.

it; and that he has said ware still ready to discharge said two notes whenever the same shall be called for.

The bill further states that the complainant has been always ready to execute the mortgage upon *West's* conveying him the lot, but that *West* has refused to make the conveyance, notwithstanding the complainant has required him to do so, and has offered to pay him the residue of the purchase-money upon his making the conveyance.

Prayer that *West* may be required to convey said lot to the complainant, and for general relief.

The answer admits the execution of the contract and of the notes as stated in the bill. It also admits the payment of three of the notes as alleged in the bill. It denies that the complainant was always ready and willing to pay the two unpaid notes, or that he had the potter's ware ready. It alleges that when said two notes respectively became due, the defendant demanded payment of the same, but the payment either in potter's ware or otherwise was refused. It denies that the complainant offered to execute the mortgage in case of the defendant's executing the conveyance for the lot. It denies that the complainant ever demanded a deed for the lot, and offered to pay the residue on the deed's being made.

The cause was submitted to the Court on the bill, answer, exhibits, and depositions; and a decree was rendered for the complainant.

This bill, not having been filed until all the notes fell due, the complainant could not have a decree for the lot without showing a payment of all the notes, or a proper offer to pay them, or something equivalent.

It was proved that the contract in question was made in said *Elkhart* county, where the lot is situate, and where the complainant resided; that the defendant resided, when the contract was made, and up to 1846, in the state of *Illinois*; and that during the year 1844, the complainant carried on, in said *Elkhart* county, the business of making potter's ware. It was also proved that when the

two notes in question respectively became due, the complainant set apart for the defendant, at a certain potter's ware shop in said county, potter's ware sufficient to discharge those notes. The only difficulty in the case is to determine, from the depositions, whether said shop was the place where the complainant carried on his said business. If it was, the ware set apart as aforesaid became the property of *West*, and the notes were paid. We have come to the conclusion, not however without some hesitation, that the complainant did carry on his said business at said shop. The consequence is, the complainant must be considered as having done all the law required, in order to perform his part of the contract.

The defendant's absence from the state was a sufficient excuse for the complainant's not demanding a deed, had such demand been otherwise necessary.

Per Curiam.—The decree is affirmed, with costs.

L. Barbours, for the plaintiff.

J. Morrison and *S. Major*, for the defendant.

May Term,
1852.

SMITH
v.
SMITH.

SMITH v. SMITH and Another.

It is immaterial whether the motion to suppress a deposition was correctly overruled or not, if the deposition was not read at the trial.

The party who, after an order for a change of venue, appears by attorney and submits the cause to a jury in the Court which granted the order, waives the right to remove the cause under the order previously made.

ERROR to the *Tippicanoe* Circuit Court.

Tuesday,
May 25.

BLACKFORD, J.—This was an action of indebitatus assumpsit brought by *Dennison B. Smith* and *George S. Hazard* against *Horace B. Smith*. There are two counts—one for goods sold and delivered, and the other for money had and received.

Plea, non assumpsit.

Verdict and judgment for the plaintiffs.

The defendant's first objection to the judgment is, that

May Term,
1852.

SMITH
v.
SMITH.

the deposition of *Charles E. Bailey* should have been suppressed. The defendant's motion to suppress *Bailey's* deposition was overruled, but whether correctly or otherwise is immaterial, as the plaintiffs did not, on the trial, read that deposition.

The second objection made to the judgment is, that notwithstanding the Court ordered a change of venue, the cause was tried by the same Court that made the order.

The transcript shows that after the order for a change of venue was made, the cause remained in the Court in which the order was made, and was continued from term to term for several terms. The parties, after those continuances, appeared in Court by their respective attorneys, and submitted their cause to the jury, upon whose verdict the judgment now in question was rendered. It is plain, therefore, that the defendant waived the right of removing the cause under the order they had obtained.

The last objection is, that the evidence does not sustain the verdict.

There is not the slightest reason to doubt on this point. There was only one witness, but his evidence clearly shows the verdict to be right. He heard the defendant expressly acknowledge that he had purchased and received the goods, for the price of which the suit was brought, and that he owed the plaintiffs for them. The judgment is for the amount of the debt, with interest from the time the principal was acknowledged to be due.

Per Curiam.—The judgment is affirmed with 10 per cent. damages and costs.

D. Mace, for the plaintiff.

E. H. Brackett and *R. C. Gregory*, for the defendants.

GREGG v. GREGG and Others.

May Term,
1852.GREGG
v.
GREGG.

Bill, under the R. S. 1843, to revise a decree for alimony, on the ground of its inadequacy for the support of the complainant and an infant daughter. The bill showed that the divorce was granted upon the complainant's petition, though for no fault of the husband; that the alimony decreed was in exact conformity to her request at the time of the divorce; and that she was permitted to retain, in addition, all the property she had brought to the husband, and some 300 dollars' worth of other property, which appeared to have been a liberal allowance. It did not allege that the husband had refused to make further allowances for the support of the complainant and child, but stated that the further allowances made by him were small in amount and accompanied by inadmissible conditions, without stating the amount or conditions. *Held*, that a demurrer to the bill was correctly sustained.

APPEAL from the *Marion* Circuit Court.Wednesday,
May 26.

SMITH, J.—This was a suit in chancery, instituted by *Myrilla Gregg* against *Thomas D. Gregg* and others. It is alleged in the bill that the complainant was divorced from the said *Thomas D. Gregg*, by a decree of the *Marion* Circuit Court, in 1847, and that, by the terms of the decree, she was to be paid the sum of 250 dollars *per annum*, for ten years only, as alimony, for the support of herself and an infant daughter, then about seven years old. The complainant states that that sum is inadequate to her support, and prays for an increased allowance.

We are of opinion that if this case is one in which the Court could, under the statute, revise or alter the decree for alimony, the bill does not show sufficient grounds for such an alteration.

The divorce was granted, upon the petition of the complainant, though for no fault of the husband, and that part of the decree specifying the sums to be paid to her as alimony was in exact conformity with her own request at the time. It further appears, that, at the time the divorce was granted, she was permitted to retain all the property she had brought to her husband, and some 300 dollars' worth of other property, in addition to the sums decreed her as alimony, which, under all the circumstances, appear to have been liberal allowances.

May Term,
1852.

HUFF
v.
EARL.

Besides, she does not allege that *Gregg* has refused to make further allowances for the support of herself and child, but merely states that the further allowances made by him are small in amount, and accompanied by inadmissible conditions, without stating the amount or conditions.

We think, therefore, the demurrer to the bill was rightly sustained.

Per Curiam.—The decree is affirmed, with costs.

L. Barbour, for the appellant.

J. Morrison and *S. Major*, for the appellees.

HUFF, Administrator, v. EARL and Others.

Where an instruction given to the jury is such that the party objecting to it has no ground to complain thereof, it will not be inquired whether the instruction was correct as an abstract legal proposition.

The giving of the power by a debtor to his creditor to sell property for the payment of his debt, does not make him a trustee of the debtor.

The purchase by a trustee, at his own sale, of the property of the *cestui que trust*, is not absolutely void. The purchase will be for the benefit of the *cestui que trust*, if the latter desires to avail himself of it; but if the *cestui que trust* chooses to confirm the purchase, or even to hold the trustee to it against his wishes, he may do so.

A debtor agreed to give his creditor a lien on personal property sold by the latter to him, and set it apart for the purpose of vesting in him possession, and gave him power to sell the property upon the non-payment of the debt. The purchase-money not being paid, the creditor proceeded to sell the property at public sale, according to the agreement, but the debtor purposely kept the property concealed and locked up from view. *Held*, that the sale was not rendered void by the property being thus kept out of view. *Held*, also, that the debtor could not complain of the inadequacy of the price caused by such concealment of the property.

If a debtor, who has set apart to his creditor specific property, and empowered him to sell it to satisfy the debt, mixes other property with it, without the consent or knowledge of the creditor, so that it cannot be distinguished, he will not be permitted to derive advantage from the act. Action upon a replevin-bond by the administrator of the assignee, for the failure of the principal in the suit in replevin to prosecute it with effect. Interlocutory judgment for want of a plea, and the assessment of damages

submitted to a jury. The suit in replevin had been brought for certain pork, hams, and lard, and was dismissed for the insufficiency of the affidavit. The defendants having adduced evidence to prove that the property replevied was the product of hogs sold by A., the principal in the bond, and one B., to C., the plaintiff's intestate, and that the latter had agreed that A. and B. should retain a lien on the property, and the vessels containing it, for a balance due for the hogs, and that the same should be kept separate from other property of like kind for that purpose, and that it was set apart for the avowed purpose of vesting the possession in A. and B.; and having also adduced evidence to prove that the intestate had given A. and B. authority to sell the property to secure the balance of the purchase-money due, upon giving certain notice, and that, after giving the notice, A. and B. sold the property at public sale, pursuant to the agreement, and bought the same for a sum less than the balance of the purchase-money due; they then offered in evidence, in mitigation of the damages, the record of a suit in assumpsit by A. and B. against the intestate for the price of the hogs, in which the intestate had pleaded the general issue, and also a special plea, which recognized the validity of said public sale, and set up that A. and B. had received therefrom a certain sum, being more than the balance due on the price of the hogs, to which the plaintiff had replied, traversing the plea as to the amount alleged to have been received, and averring it to have been a specific sum, less than the balance due on the price of the hogs, in which case there was a general verdict for A. and B., and judgment accordingly. *Held*, that said record was correctly admitted in evidence.

May Term,
1852.

HUFF
v.
EARL.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Wednesday,*

SMITH, J.—This was an action of debt, brought by the appellant against the appellees, upon a replevin-bond. *May 26.*

The declaration alleges that, on the 22d of *February*, 1840, one *Forseman*, who has since died, filed in the office of the clerk of the *Fountain* Circuit Court, an affidavit stating, that the affiant and *Earl*, one of the defendants in the present suit, were the joint owners of the pork, hams, and lard of 510 hogs, which were unjustly detained from them by *John Sherry*, *William Sherry*, *Montgomery Sherry*, *Jacob Sherry*, and *Jesse Sherry*; whereupon a writ of replevin issued, by virtue of which the sheriff took said property from the possession of the *Sherrys* and delivered it to *Forseman* and *Earl*, upon their executing a replevin-bond in the penal sum of 8,000 dollars, conditioned that they would prosecute said writ to effect, and without delay, and duly return said property in case a return should be awarded.

May Term,
1852.

HUFF
v.
EARL.

It is averred that *Forseman* and *Earl* filed their declaration in replevin, and such proceedings were thereupon had, that at the *March* term of the *Fountain* Circuit Court said writ of replevin was dismissed, in consequence of defects appearing upon the face of the affidavit, so that the said *Forseman* and *Earl* did not prosecute their said writ to effect.

It is then averred that the sheriff assigned the replevin-bond to the *Sherrys*, who assigned it to *George W. Sherry*, who has since died.

The appellant is the administrator of *George W. Sherry*, and the suit was brought against *Earl*, *Reynolds*, and *Steele*, the surviving obligors of the replevin-bond.

The defendants below filed three pleas, which were severally demurred to, and the demurrers were sustained. An interlocutory judgment was then rendered, a jury was called to assess the damages, and a judgment was rendered upon the assessment, in favor of the appellant, for the sum of 10 cents. A motion of the appellant to have the verdict set aside and a new inquest granted, was overruled.

Upon the trial, the plaintiff read in evidence the bond and indorsements described in the declaration, and proved that the property mentioned in the condition was of the value of 4,000 or 5,000 dollars when replevied.

The defendants read an agreement, in writing, dated *September 28th*, 1839, between *Forseman* and *Earl*, of the first part, and the *Sherrys* named in the bond, by the name of *John Sherry and Brothers*, of the second part, by which it was stipulated that *Forseman* and *Earl* sold to *John Sherry and Brothers* 510 hogs, on the premises of *Earl*, and a large quantity of corn in the field of said *Earl*. *Sherry and Brothers* were to pay for said hogs and corn 1,200 dollars in hand, 1,200 dollars on the 15th of *November*, 1839, and the balance on the 20th of *December*, 1839. This sale was to be considered complete at the time; but it was stipulated that *Sherry and Brothers* should not remove the hogs from the premises of *Earl* until full payment of the purchase-money was made; that *Forse-*

man and *Earl* should hold a lien on said hogs until they were fully paid for; and that on the failure of *Sherry* and *Brothers* to pay said purchase-money, it should be lawful for *Forseman* and *Earl*, on giving fifteen days' notice, by one advertisement in a newspaper at *Lafayette*, to sell said hogs, at public sale, to the highest bidder, and out of the proceeds pay themselves what might be due.

May Term,
1852.

HUFF
v.
EARL.

To this agreement there was attached a memorandum signed by the contracting parties, and dated *December 24th, 1839*, to the following effect: That the foregoing agreement was so modified, that *Sherry* and *Brothers* should be at liberty to slaughter and pack said hogs in their pork-house, notwithstanding they had failed to make payment according to their contract; but *Forseman* and *Earl* should hold a lien on the pork, hams, and lard of said hogs, when so slaughtered, and the vessels in which they should be packed; that *Sherry* and *Brothers* should keep the same separate and apart from all other pork, hams, and lard, so that the same could be readily distinguished, and should not be at liberty to remove the same from their said pork-house until full payment of the purchase-money, with interest from the time of their default, should be made; and that *Forseman* and *Earl* should be at liberty, at any time, to sell said pork and vessels, on giving notice as provided in the previous agreement, and out of the proceeds pay themselves all arrearages of the purchase-money and interest.

The defendants then proved, that on the 7th of *February, 1840*, the following notice was inserted in a newspaper published at *Lafayette*.

"There will be sold, at public auction, the pork, hams, and lard of 510 hogs, at the pork-house of *John Sherry* and *Brothers*, on the 22d of *February, 1840*, to satisfy a lien of the undersigned on said pork, hams, and lard. Terms of sale made known on the day of sale." (Signed) "*Forseman* and *Earl*."

They then proved by one *Hart*, that he (*Hart*) was employed by *Forseman* to sell some pork on the day named in the above notice, at the pork-house of *Sherry* and *Bro-*

May Term,
1852.

HUFF
v.
EARL.

thers; that he saw there the defendants and some of the *Sherrys*; that he was directed to cry the pork, hams, and lard of 510 hogs, which he did at one offer, and they were struck off to *Forseman*, he being the only bidder, at a price which he did not remember; that the pork-house was locked up, so that it could not be entered, and he did not see the pork, or have any of it in his possession.

One *Kiser* was then called, and he testified, on behalf of the defendants, that he was employed to help kill the hogs in question at *Sherrys'* pork-house; that the hogs were killed, salted, and put up separately from other hogs, the lard being put in barrels and kegs; that some time afterwards, *Forseman* and *Earl* came, and in the presence of one of the *Sherrys*, moved the pork, hams, and lard to another part of the pork-house, putting up plank between that and other pork, the parties saying that the object of *Forseman* and *Earl* was to take possession of it; that after the pork had been thus placed apart by *Forseman* and *Earl*, the *Sherrys* removed some of it and placed other pork in lieu of that removed, saying there was some difficulty, and that *Forseman* and *Earl* might look out; that on the day of sale, and while the sale was being made, there were persons in the pork-house, but the doors were locked—*William Sherry* having the keys; that the pork sold for 1,000 dollars, and, after the sale, the sheriff of *Fountain* county came with a writ of replevin and took possession of the pork which had been so placed by itself, and it was taken away on a steam-boat by *Forseman* and *Earl*, who received it from the sheriff.

This witness, on cross-examination, stated that 47 or 57 of the 510 hogs of *Forseman* and *Earl* were not slaughtered, that number having been turned out of the drove as being too lean, and suitable only for stock-hogs, but the product of 510 hogs was taken under the writ of replevin, the pork taken under said writ being the same that had been before set apart, except so much of it as had been mixed by the *Sherrys*.

The defendants also gave in evidence, the record of a suit commenced in the *Tippecanoe* Circuit Court, at the

August term, 1841, by *Forseman* and *Earl* against *John Sherry* and *Brothers*. May Term, 1852.

HUFF
V.
EARL.

This was an action of assumpsit founded on the agreement given in evidence in this suit. The declaration averred that the purchase-money of said hogs and corn amounted to 5,655 dollars, all of which was due and unpaid. The defendants, the *Sherrys*, filed four pleas, the first being the general issue, and the second a plea of payment. The third plea averred that *Forseman* and *Earl* did give notice and did sell, on said 22d day of *February*, 1840, pursuant to the agreement and memorandum modifying it, said pork, hams, and lard from said 510 hogs, for 7,000 dollars, and did fully pay themselves out of the proceeds. The fourth plea averred that the plaintiffs were bound to make their pay for said hogs and corn out of said pork, hams, and lard, and that they might have made all that was due them if they had sold the same according to the agreement.

The plaintiffs replied to the second plea, denying payment, and to the third *precludi non*, except as to 1,000 dollars, because the proceeds of the sale amounted to that sum and no more. A demurrer was sustained to the fourth plea, and, issues being joined on the first three, there was a trial and the plaintiffs recovered a judgment for 3,811 dollars damages.

The evidence introduced by the defendant was designed to show, that the property described in the writ of replevin was not, at the time it was taken, the property of the *Sherrys*, but the property of the replevin-plaintiffs, and that, therefore, the plaintiff in this suit was entitled to recover only nominal damages. It appears that the defense thus set up was successful on the trial in the Court of Common Pleas, and the appellant now contends, that the judgment rendered by that Court was not warranted by the facts.

The first position taken by the counsel for the appellant is, that *Forseman* and *Earl* abandoned their lien as vendors, by surrendering the possession of the property to the *Sherrys* as vendees; and the reservations in the

May Term,
1852.

HUFF
v.
EARL.

agreements stipulating that the former should hold a lien on the chattels sold, being *executory* only, did not vest any property in them. Upon this point the jury was instructed that the agreements created, at most, but a dormant lien, and the right of the vendors to enforce it, by their own act, without the aid of the law, was lost with the possession; but if the property was afterwards redelivered to the vendors for the express purpose of rendering it subject to their lien, the lien would revive from that time and continue so long as they retained the possession. This question, respecting the lien retained by *Forseman* and *Earl*, can only be material so far as it affects their right to make the sale which was made, or attempted to be made, in pursuance of the contract between the parties; and we think the appellant has no reason to complain of the instruction given. If, after the hogs were slaughtered, the *Sherrys* voluntarily delivered the pork and lard to the vendors, to enable them to make a sale pursuant to the contract, and there is evidence from which it might be inferred that they did so, this delivery, if *Forseman* and *Earl* retained possession under it to the time of sale, would render the argument that the contract was merely *executory* irrelevant. If the contract was, that the *Sherrys*, in case of their failure to pay the purchase-money, would permit the vendors to have possession of and to make sale of the property, and they did give the vendors possession and suffer them to retain it until the sale was made, this would be an *execution* of the contract.

It is further insisted by the appellant that the sale was void for other reasons. One of them is, that, in making the sale, *Forseman* and *Earl* acted as the agents or trustees of the *Sherrys*, and could not be purchasers. The giving a creditor a power to sell property for the payment of his debt, does not make him a trustee of the debtor, but even if *Forseman* could be considered as standing in that relation to the *Sherrys*, his being the purchaser would not render the sale absolutely void. The doctrine upon this subject is, that a trustee cannot be a purchaser of the

trust-estate, for his own benefit, but his purchase will be for the benefit of the *cestui que trust*, if the latter desires to avail himself of it. But, if the *cestui que trust* chooses to confirm the purchase, or even to hold the trustee to it against his wishes, he can do so. See *Brackenridge v. Holland*, 2 Blackf. 377, where this question is discussed and many authorities cited.

May Term,
1852.

HUFF
v.
EARL.

Other objections made to the sale are, that the goods were not in view, were not identified, and were not in the possession or under the control of *Forseman* and *Earl* when the sale was made. Upon these points the Court instructed the jury that the circumstance that the property was not in view at the time of the sale, would not alone render the sale void, if the other party was in fault; and if a mixture was made by the *Sherrys*, after the property had been set apart by *Forseman* and *Earl*, and without their knowledge or consent, such mixture of other pork with that sold could not be taken advantage of by the plaintiff. We think these instructions were warranted by the facts. If *Forseman* and *Earl* acquired lawful possession of the property prior to the sale, the mere locking up of the pork-house in which it was contained, on the day of sale, would not deprive them of their authority to sell; and if the *Sherrys* purposely threw obstacles in the way of an advantageous sale, by preventing the property from being visible, which it may be inferred from the evidence they did, they have no reason to complain of the natural results of their own acts. The rule with respect to the admixture of property in such cases, is too well known to require repetition here. That also is stated in the case of *Brackenridge v. Holland*, *supra*.

The record of the former suit brought by *Forseman* and *Earl* against the *Sherrys*, affords proof that the latter admitted the validity of the sale, and availed themselves of it, under their third plea, to reduce the damages recoverable in that action. The plea states the date of the sale referred to, and shows it was the same sale the validity of which is now disputed. The replication admits there was such a sale, and that it produced 1,000 dollars, which

May Term,
1852.

HUFF
v.
EARL.

were received in part payment of the plaintiff's demand. The verdict is general, and does not show on which issues the damages were assessed, but this admission upon the record constituted a complete bar to that much of the plaintiffs' demand, whatever might have been the findings upon the issues made by the other pleas. If the *Sherrys* had proved that the proceeds received amounted to the whole of the purchase-money, the plaintiffs would have recovered nothing; and, as the plaintiffs admitted that they received a certain sum in part payment, they were not entitled to recover any more than the balance which remained in controversy. It is true the law allows conflicting and contradictory pleas, and a variety of distinct defenses may be set up, but if the defendant sustains any one valid plea to the whole cause of action, he defeats the suit, and so if he sustains a plea to a part of the cause of action, he defeats it to that extent.

The admission of this record in evidence was objected to, but the objection was overruled. The jury were instructed that, as oral evidence of the sale was also given, they should not regard the record as conclusive, but as evidence of a high character, taken in connection with the oral testimony, that the sale was valid. The appellant cannot object to this instruction. Where, in an action of debt on an award, the defendant, under the general issue, contended that the instrument of submission was not properly executed, and the plaintiff produced a record showing that, subsequently to the award, he had sued the defendant in assumpsit for the same demand that was included in the submission, and that the defendant defeated the suit by relying on the submission and award; it was held by this Court that the law would not sanction such an inconsistency as to permit the defendant to defeat the plaintiff's action of assumpsit by pleading the award, and then defeat his subsequent suit for the same demand, by denying the validity of the award. *Stipp v. The Washington Hall Company*, 5 Blackf. 473. That case is very analagous to the one under consideration. The *Sherrys* pleaded the sale in question, and re-

lied upon it to defeat the action of *Forseman* and *Earl* for the recovery of the purchase-money due them, and the representative of the assignee of the *Sherrys* now seeks to recover the value of the property on the ground that the sale was invalid. The inconsistency would be equally great.

May Term,
1852.

HUFF
v.
EARL.

It may be observed here, that the evidence afforded by this record has a bearing upon all the objections to the sale before noticed. The fact that they themselves insisted on the sale to reduce the claim of *Forseman* and *Earl* for the purchase-money, may, at least, be considered evidence that the *Sherrys* admitted its validity and waived any objections to the mode or manner in which it was made. This they could do if they thought proper, even if there were objections which otherwise would have rendered the sale invalid. If they had made a settlement with *Forseman* and *Earl*, without being sued, for the purchase-money due by their contract, and at such settlement they had claimed and obtained a deduction for the proceeds of the sale which had been made, that would, certainly, have been evidence of a waiver, on their part, of any objections to the sale. Of course, the fact that they made such a claim to reduce the damages in an action of assumpsit for the purchase-money, is, at least, equally strong evidence to that effect.

We are of opinion, therefore, that there was sufficient evidence to warrant the finding of the jury, and there is no error apparent on the record.

Per Curiam.—The judgment is affirmed with costs.

Z. Baird, R. Jones, R. C. Gregory, J. Pettit, and S. A. Huff, for the appellant.

G. S. Orth and E. H. Brackett, for the appellees.

May Term,
1852.

COLERICK

v.

HOOPER.

3	316
138	106
139	90

3	316
164	532

3c	316
166	107
166	122
167	188

COLERICK and Others v. HOOPER.

The record of the proceedings in a suit in chancery pending by writ of error in the Supreme Court, being alleged to be defective, the latter Court awarded a *certiorari* to the clerk of the Circuit Court to certify a complete transcript of the proceedings. The Circuit Court, after the term had expired at which the decree, which was upon default, was made, and after the *certiorari* had been issued, ordered the clerk to copy the subpoenas and returns into the record, it having been shown to the Court that, when the default was taken, proof of the service of the subpoenas had been duly made. *Held*, that it was competent for the Court to make the order.

The sheriff's return to a subpoena in chancery showed that one of the defendants (naming him) had been "served," and that the others were "not found," &c. *Held*, that the language must be inferred to import that the service upon the defendant alleged to have been "served," was a personal one.

Where a written instrument contains all the facts of a contract, except such as may be proved by parol, it is sufficiently certain to be enforced.

The language of an agreement was as follows: I have this day sold my lot to A. B. on the plat in the town of *South Bend*—on the plat of said town on the river-bank. I have received value and will make the deed as soon as convenient. August 11, 1835. (Signed) C. D. *Held*, that parol evidence was admissible to identify the particular lot intended to be conveyed, and that the contract was, therefore, sufficiently certain to be the foundation of a bill for specific performance.

When a bill in chancery is against adult residents of the state, who are personally served with notice, and the allegations of the bill are certain—especially if the subject matter of the allegations is of a certain and definite nature—a final decree, after a decree *pro confesso* upon a default, may be made without proof.

The assignment of a written contract for the sale of land, under the R. S. 1843, carried with it the legal title to the instrument, and upon a suit by the assignee for a specific performance, the assignor is not a necessary party.

Wednesday,
May 26.

ERROR to the *St. Joseph* Circuit Court.

PERKINS, J.—This was a bill in chancery to enforce the specific performance of an agreement for the sale of a lot in the town of *South Bend*. A decree for performance was obtained. It is claimed that that decree should be reversed for the following reasons:

1. The decree was rendered upon default, and the record, as first brought into this Court, did not show notice to the defendants. By *certiorari*, a new transcript was

obtained, wherein, by order of the Court below, made after the *certiorari* was issued, the clerk had copied the writs and returns of services thereon which remained on file in his office, and which showed that notice was duly given to the defendants in the suit. It is denied that the Circuit Court had power to order the clerk to copy the writs and returns into the record after the expiration of the term of the Court at which the decree in the cause was made, and after the issuing of the *certiorari*. But we think the Court had such power. It was made to appear, at the time the Court entered said order, that, on taking the default in the cause, proof of the service of the writs was duly made to the Circuit Court. It was a clerical error, therefore, by which the entering of those writs and returns, or, in lieu of them, a statement that process had been duly served, was omitted.

May Term,
1852.

COLERICK
v.
HOOPER.

2. It is contended that the returns upon the writs do not show that legal service had been made. They are as follows :

"Came to hand *January* 10th, 1844. Served on *John A. Henricks* the 12th day of *January*, 1844. As to *Alexis Coquillard* and *David H. Colerick*, they are not found in my bailiwick. Sheriff's fees," &c., and signature of sheriff.

"Served as commanded on *D. H. Colerick*, *January* 23d, 1844. Not found as to the other defendants. Service," &c., and signature. The bill was dismissed as to *Coquillard*. It is objected that these returns do not specify the manner of service, and claimed that they should do so with particularity.

It would have been well to have stated whether the service was upon the defendants personally or by leaving copies at their places of residence; but we think a legal service shown with reasonable certainty. The officer says he served the process on some, and could not find other of the defendants. The inference is, that a personal service was made upon those found.

3. It is argued that the contract sought to be specifically

May Term,
1852.

COLERICK
v.
HOOPER.

enforced is too vague to sustain the bill. The following is a copy of it:

"I have this day sold my lot to *Alexis Coquillard* on the plat in the town of *South Bend*; on the plat of said town on the river bank. I have received value and will make the deed as soon as convenient. *August 11, 1835. D. H. Colerick. Attest: H. R. Colerick.*"

This memorandum contains the names of the parties, acknowledges the reception of the consideration, thus rendering it immaterial that its amount or character should be particularly stated, and describes the property sold, not with the utmost certainty it is true, but so that it could be identified; and parol evidence for that purpose would be admissible. Such evidence would not be required in this case to make out the terms of the agreement, but to apply the agreement to the subject-matter of it. The thing sold was *Colerick's* lot on the river-bank in the town of *South Bend*. The written contract assumed that he had one lot on said bank in said town, and implied that he had but one. Which was it, was the only remaining question to be settled. This question could be easily answered from the data given for identifying the lot. And where a written instrument contains all the facts of a contract, except such as may legitimately be proved by parol evidence, where there is a written agreement, that instrument is sufficiently certain to be enforced. The bill, in this case, avers that *Colerick* had, at the date of said agreement, one lot, and but one, in said town, and that it was lot No. 94, for which a conveyance was sought in this suit. We think the bill sustainable.

4. As we have stated, the final decree in this cause was taken *pro confesso* on default; and it is urged that the Court erred in not requiring proof of the allegations in the bill before the rendering of such a decree. There is not a uniformity in the practice of Courts upon this point. See the cases collected in the 1st vol. of *Dan. Ch. Pr.*, *Perk. Ed.*, in notes on page 577. But a line of decision has been pursued in this state long enough to settle the

rule here. That rule, we think, may be stated to be, that where the bill is against adult residents of the state, who are personally served with notice, and the allegations of the bill are certain—especially, if the subject-matters of those allegations are of a definite and certain nature—a final decree, after a decree *pro confesso*, may be rendered without proof. Thus broadly, at any rate, we are safe in laying down the rule, and, so laid down, it includes this case. Here every material allegation in the bill, except as to the number of the lot, was supported by the agreement in writing, copied into the bill, and as to the number of the lot, the allegation was certain and the subject-matter of it was of a definite character. See *Pegg v. Davis*, 2 Blackf. 281.—*Platt v. Judson*, 3 id. 235.—*Fellows v. Shelmire*, 5 id. 48.—*Close v. Hunt*, 8 id. 254.—*Trimble v. White et al.*, 2 Carter's Ind. R. 205.—*Bowman et al. v. Hall et al.*, id. 206.

5. The fifth point raised is, that no decree could be rendered in the case till *Coquillard* was made a party. He was the first assignor of the instrument on which the bill was founded. By our statute, the assignment of such an instrument carries with it the legal title and not a mere equity, and *Coquillard* does not appear to have any further interest in that in question. We think, therefore, that, though a proper, he was not a necessary party. Our statute (R. S. sect. 41, p. 839) enacts that—

"If the defendant, at the hearing of a cause, object that the suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified, by name or description, the parties to whom the objection applies, the Court, if it think fit, shall be at liberty to make a decree saving the rights of the absent parties."

No rights of *Coquillard* can be prejudiced by the decree rendered in this case, and no objection was made below.

Per Curiam.—The decree is affirmed with costs.

J. G. Walpole and *R. L. Walpole*, for the plaintiffs.

J. L. Jernegan, for the defendant.

May Term,
1852.

COLLIER
v.
HOOPER.

May Term,
1852.

SHERRY

v.

SANSBERRY.

SHERRY v. SANSBERRY.

A guardian may invest the money of his ward in real estate, under an order of the proper Court.

If he converts it into real estate, without such an order, he may be liable to answer for any loss that may follow, and the ward will have the option, when he arrives at full age, to accept the real estate, or to refuse it, convey it to his guardian and require the purchase-money and interest. If he accepts the real estate, with a full knowledge of all the facts, and without fraud on the part of the guardian, he will be bound by the acceptance.

So the ward may, on arriving at full age, purchase property from his late guardian; and although such a purchase will be closely scrutinized by a Court of equity, yet, if fairly made, it will stand.

A guardian contracted with his ward, two years before the latter arrived at full age, to sell to him a tract of land, for a sum agreed upon. The ward went into possession, and remained there till he attained to his majority, and, hence, knew the location, quality and value of the land. With this knowledge, and without, so far as appeared, any undue influence on the part of the guardian, he accepted a deed for the land after he became of full age, and subsequently retained the possession and use of it for fifteen months without objection. *Held*, that the ward could not have the sale set aside and compel the guardian to account for the purchase-money.

A direction or order given to a guardian by a Probate Court, within the sphere of its jurisdiction, cannot be impeached collaterally, except for fraud.

Wednesday,
May 26.

ERROR to the *Delaware* Circuit Court.

PERKINS, J.—This was a bill in chancery filed by *James W. Sansberry* against *John Sherry*.

The plaintiff alleges that he is the son of *James Sansberry*, deceased; that in *September*, 1839, he was an infant, fifteen years of age; that in *May*, 1840, *John Sherry* was appointed, by the *Rush* Probate Court, the guardian of his person and estate, and filed his bond, with *John Kirkpatrick* as surety; that immediately thereafter said *Sherry* received, as such guardian, 400 dollars of money belonging to said plaintiff, and used and wasted it; that the plaintiff became of age in *September*, 1845, and has been unable to get an accounting and settlement from said guardian; that said guardian wrongfully paid to one *Daniel Sherry* 55 dollars and 65 cents of the plaintiff's money; and that, in 1843, when said plaintiff was but nine-

teen years of age, the defendant fraudulently induced him to purchase of said defendant 80 acres of land in *Delaware* county for the price of 300 dollars, at which sum he charged it to the plaintiff and retained money to that amount in payment; that when said plaintiff came of age the defendant made him a deed to said land, then worth much less than 300 dollars; that during plaintiff's minority he made improvements on the land to the value of 10 dollars, and paid certain taxes; that he has applied to the defendant to take back the land and settle with plaintiff by paying him his money, and has tendered a reconveyance of it, which was acknowledged on the 21st of *December*, 1846. The date of the tender does not appear. The bill prays an accounting and payment in money.

May Term,
1852.

SHERRY.
v.
SANSBERRY.

The defendant's answer admits the guardianship and bond, but alleges that he has fully settled his accounts; paid over all moneys in his hands; denies all fraud, and avers that the land was purchased for, and sold to, the ward, the plaintiff, at his earnest solicitation; that he was in possession of it two years before he arrived at majority, and received his deed, and that he well knew its value, &c., and that it was worth 300 dollars. As to the sum paid to *Daniel Sherry*, he says it was for the board and clothes of the ward; and he makes an exhibit of the following records of proceedings had in the *Rush* Probate Court, as showing the truth of the case, viz.:

"*Daniel Sherry v. John Sherry*, guardian of *James Sansberry*. Be it remembered, that on the first juridical day of the *August* term of the *Rush* Probate Court, begun and held in *Rushville*, *Rush* county, *Indiana*, on the second *Monday* and eleventh day of *August*, 1845, before the *Hon. Alexander Walker*, probate judge of *Rush* county, now comes *Daniel Sherry*, and files the following claim, to-wit:

"*John Sherry*, guardian of *James Sansberry*, jun., to *Daniel Sherry*, Dr.

To boarding, clothing, and taking care of said minor heir

May Term, 1852.	from <i>September</i> , 1830, to <i>November</i> , 1839, at 30 dollars per year,.....	\$270 00
SHERRY v. SANSBERRY.	To schooling, boarding, &c., from 1839 to 1845,	50 00

Total, \$320 00

" *August* 11th, 1845. *Daniel Sherry*.

" Thereupon the Court, after hearing the evidence, order said guardian to pay to the said *Daniel Sherry* the sum of 150 dollars for boarding and clothing said ward."

" *John Sherry*, guardian of *James Sansberry*. Final settlement. Be it remembered, that on the second juridical day of the *Rush* Probate Court, begun and held in the court-house in *Rushville*, *Rush* county, *Indiana*, on the second *Monday* and eleventh day of *November*, 1845, before the Hon. *Alexander Walker*, probate judge of *Rush* county, now comes said guardian and files his exhibit on final settlement, to-wit: Exhibit of *John Sherry*, guardian of *James Sansberry*, in final settlement. To amount of money received altogether,..... \$364 25

Interest, 34 65

Total, \$398 90

By land purchased as per acquittance of *James*

Sansberry, 300 00

Daniel Sherry, as per receipt, 55 65

R. Thompson, 1 12

J. W. Alley, 1 00

Said guardian claims for his services, and money expended by him, 36 75

Taxes paid for the years 1844 and 1845, '44 paid and '45 charged to the said guardian, .. 4 38

\$398 90

J. L. Robinson, 1 25

Tingley and *Hubbard*, 1 00"

Then follows an affidavit of the correctness of two of the items of the account for which the guardian had lost the receipts, and which it is unnecessary to copy into this

opinion. The record proceeds: "And it is considered that he has properly performed his duties and trusts in the premises, and rightfully settled with his ward, and that he be hence discharged without day."

May Term,
1852.

SHERRY
v.
SANSBERRY.

"State of *Indiana*, *Rush* county, ss. I, *John L. Robinson*, clerk of the *Rush* Circuit Court in and for said county of *Rush*, in the state of *Indiana*, hereby certify that the above and foregoing are true and correct and complete copies of the proceedings in the above entitled causes; that the above exhibit of the said *John Sherry*, said guardian, and the proceedings of the Court thereon, are true and correct copies of the original exhibit and proceedings; and that the above proceedings wherein *Daniel Sherry* is plaintiff and *John Sherry*, guardian, &c., defendant, are also true and correct copies of the original proceedings.

"Given under my hand and the seal of said Court at *Rushville*, this 9th day of *October*, 1847. *John L. Robinson*, clerk."

The clerk of the Circuit Court is, by law, *ex officio*, clerk of the Probate Court.

The usual replication was filed to the answer. No depositions were taken. The cause was set down for hearing, and the Court decreed that the guardian should take back the land and account to the ward in money. As to the payment to *Daniel Sherry*, a bill of exceptions states that on the accounting had in the case pursuant to said decree to account, "the following order of the *Rush* Probate Court being in evidence, being the order above set out in favor of *Daniel Sherry* against said defendant for 150 dollars, the plaintiff offered to introduce evidence for the purpose of going behind said order and contesting the cause of action and consideration on which it was founded; the defendant objected, the Court overruled the objection, and suffered the evidence to be introduced," &c.

Two questions arise in this case.

1. Did the Court err in requiring the guardian to take back the land sold to the ward?

May Term,
1852.

SHERRY
v.
SANSBERRY.

2. Did the Court err in permitting the merits of the order of the *Rush* Probate Court in reference to the claim of *Daniel Sherry* to be re-investigated?

It is the duty of a guardian to invest, in the most judicious manner, according to his judgment, the money of his ward. It has not formerly been generally considered advisable to convert it into real estate, but still the guardian possesses the power so to convert it. He may and should do this, if at all, under an order of the proper Court; R. S., p. 610, s. 96; and if he do, the order will protect him from the consequences of the act. If he convert it without such order, he may be liable to answer for any loss that may accrue, and the ward will have the option, on coming of age, of refusing the realty, conveying it to his guardian, and requiring the purchase-money and interest, or of accepting the realty. 2 Kent, 6 ed., 230. If he do then accept the real estate, and thus affirm the act of his guardian, it being done with full knowledge of all the facts, and without fraud on the part of the guardian, the ward will be bound by such acceptance. So the ward may, on arriving at majority, purchase property from his late guardian. Such a purchase will be closely scrutinized by a Court of equity, but if fairly made, it will stand. See *Kirby v. Taylor*, 6 John. Ch. R. 242.

Regarding the transaction in question, either as an investment, by the guardian, of the ward's money in real estate, or as a purchase by the ward from his guardian after arriving at majority, or as partaking of the character of both these acts, should it be affirmed or annulled? It appears that the guardian contracted the land in controversy, at a price fixed, to his ward, two years before he became of age; that the ward went into possession, (for he says he made an improvement on the land while he was a minor); that hence, for all that time, he knew the location, quality, and price of the land; that with this knowledge, and without, so far as appears, any undue influence on the part of his guardian, he accepted, after arriving at majority, a deed for said land, and afterwards retained

the possession and use of it for fifteen months, without objection.

We think, from these facts, the conclusion is, that the ward accepted the land after becoming of age, on his own unbiased judgment; and having done so, we think he is bound by that acceptance. If there were any circumstances in the case making it fraudulent, he should have shown them.

In coming to this conclusion, we have not taken into consideration the fact that the Probate Court of *Rush* county appears, on the final settlement of the guardian, to have approved of the investment of the money in the land in question. We intend no opinion as to the effect of that sanction of the transaction. See *Field v. Schiefelin*, 7 John. Ch. R. 150.

We think the Court also erred in re-examining, on its merits, the subject matter of the order of the *Rush* Probate Court for the payment of money to *Daniel Sherry*.

It is the office and duty of the Probate Courts of our state to exercise a care and guardianship over the estates of minors and others under disability, when legally placed under their jurisdiction, and to direct those who may be in the administration of such estates. They possess the powers to make all orders necessary to the proper discharge of such duty. R. S., *supra*. And, on principle, it seems to us, those orders should not be impeached collaterally, except for fraud. If they can be, they will certainly afford no protection to those whose duty it is to act under them, and the conferring of the power upon the Courts to make them was an idle act. In regard to executors and administrators, our statute provides, R. S., p. 552, s. 366: "The order or decree of the Probate Court, in making distribution of the estate of the deceased, or any order or allowance of the Probate Court of any debt, claim, or demand against the estate of the deceased, and every allowance and settlement by the Probate Court of any account rendered by such executor or administrator in said Court, if such order, allowance, or settlement was

May Term,
1852.

SHERRY
V.
SANSBERRY.

May Term,
1852.

SHERRY
v.
SANSBERRY.

obtained or suffered by such executor or administrator in good faith, without fraud, collusion, or negligence, shall be conclusive evidence in his favor, and a full justification for him in respect to any payment made in pursuance of any such order or allowance, and in respect to any matters settled, adjusted, or disposed of by any such order, allowance, or settlement."

As to guardians, section 96, p. 610³, of the same statutes confers upon them power to, "at any time, give such directions, and make such orders as the case may require, for managing, investing, and disposing of, the estate and effects in the hands of the guardian," but it does not declare the effect such orders shall have; but we think it results from general principles of law, that, when made within the jurisdiction of the Court, they are conclusive where there is no fraud.

To prevent misapprehension, we should remark that the rule here laid down is regarded as governing those orders only made between administrators and guardians and third persons, and not as applicable to *ex parte* settlements of their own accounts with estates in Court. These, as has been often decided, are but *prima facie* correct.

The Court, in this case, therefore, should first have limited the evidence to the proof of fraud in the order for said payment to *Sherry*. If set aside for that cause, a re-examination on the merits would follow.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

W. March, for the plaintiff.

T. J. Sample and *D. Kilgore*, for the defendant.

JONES and Another v. RANSOM.

May Term
1852.

JONES
v.
RANSOM.

To affect a person with notice of a fact by communications made to one alleged to have been his agent, the agency of the latter must first be proved.

While the law was, that, where evidence was objected to, the grounds of the objections should be stated, objections were made without assigning the reasons. Held, that they were correctly overruled.

An attorney at law to whom a claim has been sent for collection, and who has obtained a judgment thereon, cannot, without special authority, receive, by way of compromise, notes of third persons in satisfaction of the judgment.

A judgment may be discharged by the receipt of assigned notes of a less amount than the judgment in satisfaction thereof.

APPEAL from the *Vigo* Circuit Court.

Wednesday,
May 26.

BLACKFORD, J.—This is a case of *scire facias*, issued on the 21st of February, 1848, in favor of *Ransom* against *Ezra M. and Joseph V. Jones*, to revive a judgment. The judgment was rendered by the *Vigo* Circuit Court, at the June term, 1838, for 799 dollars and 80 cents.

To this *scire facias*, the defendants pleaded payment.

The cause was tried by the Court, and execution awarded for the whole amount of the judgment.

On the trial, *Ransom* gave in evidence the record of the judgment described in the *scire facias*.

The defendants introduced evidence tending to show the following facts:

The judgment described in the *scire facias* was obtained for *Ransom* by *Kinney* and *Barbour* as attorneys at law of *Ransom*.

In July, 1838, said *Barbour* wrote to *Ransom*, who lived in *New York*, informing him of the judgment; and that the said *Joneses* were not able to pay all their debts, but that he, *Barbour*, would not make a compromise with them, unless directed to do so.

In December, 1838, *Kinney* and *Barbour*, as attorneys as aforesaid of *Ransom*, received, by way of compromise, from the *Joneses* several promissory notes on various individuals, to the amount of 600 or 700 dollars, in satis-

May Term, 1852. faction of the judgment, which notes were assigned to Ransom.

JONES
v.
RANSOM.

In February, 1840, said Barbour paid to one Gibson 100 dollars for Ransom, being money collected on said assigned notes.

In August, 1846, Ransom wrote to Griswold and Usher, attorneys at Terre Haute, requesting them to collect his claim due from the Joneses. In that letter, Ransom says that he had, about seven years before, sent the claim to Kinney and Barbour for collection; and he acknowledges having received from Gibson the 100 dollars which Barbour had previously paid to Gibson as aforesaid.

Griswold and Usher, soon after the receipt of Ransom's said letter to them, showed the letter to Barbour, informing him that Ransom disapproved of the said compromise.

In August, 1848, Barbour transmitted to Ransom, in a letter, 231 dollars and 34 cents, saying that that closed the doings of Kinney and Barbour in the premises. The letter inclosing that money informed Ransom of said compromise, and stated that the writer, Barbour, had informed him of the same, by letter, in November, 1846, and stated further that in the letter of 1846, there was inclosed the sum of 452 dollars and 59 cents, as money collected on said assigned notes.

In October, 1848, Ransom, in a letter to Griswold, acknowledged the receipt from Barbour, of said 231 dollars and 34 cents.

There is also a receipt for said remittance of 452 dollars and 59 cents, made by Barbour to Ransom after the business came to the hands of Griswold and Usher.

On the trial, the defendants offered to prove that Barbour, when he paid Gibson the 100 dollars, told him of said compromise, but the evidence was rejected, and we think rightly. It does not appear that Gibson was Ransom's agent, or that he ever informed Ransom of what Barbour had told him.

Part of the evidence offered by the plaintiff was ob-

jected to, and the objection was correctly overruled. The ground of the objection does not appear to have been shown, as the law required when this trial was had. The plaintiff was not bound by the compromise at the time it was made; the attorneys at law having no authority to make it. *Miller v. Edmonston*, 8 Blackf. 291. We are of opinion, however, that on the evidence tending to show payments to *Ransom* and to raise a presumption of his ratification of the compromise, there ought to be another trial.

May Term,
1852.

DOE
v.
SWAILS.

The objection made to the compromise that the amount of the assigned notes received in satisfaction of the judgment was less than the amount of the judgment, is not sustainable. See *Thompson v. Percival*, 5 Barn. and Adol. 925.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c. .

S. Judah, J. H. Henry, and C. W. Barbour, for the appellants.

W. D. Griswold and J. P. Usher, for the appellee.

DOE on the Demise of SEARIGHT and Others v. SWAILS.

In ejectment, the defendant cannot prove that a deed professing to convey a specific number of acres, was intended to convey more.

ERROR to the *Decatur* Circuit Court.

Wednesday,
May 26.

BLACKFORD, J.—This was an action of ejectment for a piece of land alleged in the declaration to contain five acres, being part of the west half of the north-east quarter of section thirty-five, town twelve, range nine, and situate in *Decatur* county.

Plea, not guilty.

The cause was submitted to the Court, and judgment rendered for the defendant.

May Term,
1852.

DOR
V.
SWAILS.

The facts of this case necessary to be noticed, are as follows:

William Searight was the original owner in fee of the west half of said quarter section of land. He sold fifty-five acres and seventy-seven hundredths of an acre off the north end of said half quarter section to *Joseph Searight*, and afterwards died seized in fee of the residue of said half quarter section, which residue lies south of the part he had sold as aforesaid. That unsold part contained twenty-six acres and thirty-three hundredths. The lessors of the plaintiff, as the heirs of *William Searight*, inherited said tract of twenty-six acres and thirty-three hundredths. Those heirs afterwards conveyed in fee to *Nathan P. Swails* a certain parcel of land described as follows, to-wit, twenty-five acres off the south end of the west half of the north-east quarter of section thirty-five, town twelve, range nine, leaving, apparently, undisposed of, a strip of land north of said twenty-five acres, of one acre and thirty-three hundredths; and it is that strip which the plaintiff is now seeking to recover.

The defendant, who claims under said *Nathan*, offered parol testimony to show that said *Nathan's* purchase from said heirs covered the whole of said twenty-six acres and thirty-three hundredths. This testimony was objected to on the ground that it contradicted or varied the terms of the deed from said heirs to said *Nathan*; but the objection was overruled.

The admission of this parol testimony is assigned for error.

We think it is very evident that the evidence was not admissible. The deed to said *Nathan* conveys a tract of land described as twenty-five acres off the south end of said half quarter section. The parol testimony tending to show it was not twenty-five acres, but twenty-six acres and thirty-three hundredths which said *Nathan* purchased, was varying and adding to the terms of the deed. The admission of that testimony was not only in violation of the common law as varying the terms of the deed, but it

was also in violation of the statute of frauds, which prohibits unwritten contracts for the sale of land.

May Term,
1852.

Per Curiam.—The judgment is reversed with costs.
Cause remanded, &c.

YOST
v.
SHAFFER.

J. Robinson and J. S. Scobey, for the plaintiff.

A. Davison, for the defendant.

YOST *v* SHAFFER.

Where, at the time of making a contract for the sale of land, the vendor has fraudulently misrepresented the quantity, a Court of equity, upon the application of the vendee, will rescind the contract.

Such vendor cannot, by afterwards purchasing and tendering to the vendee a conveyance for an adjoining quantity sufficient to make up the deficiency, deprive the latter of the right to rescind the contract.

ERROR to the *Henry* Circuit Court.

Thursday,
May 27.

SMITH, J.—This was a bill in chancery filed by the defendant in error against the plaintiff in error, to obtain the rescission of a contract for the sale by the latter to the former of a certain tract of land, upon the ground that the vendor fraudulently misrepresented the number of acres contained in the tract. The decree was in favor of the complainant.

The answer of *Yost* as to his knowledge of the quantity of land in the tract sold to *Shaffer*, is equivocal, and we think it is sufficiently proved by the admissions in the answer and by the depositions, that he did intentionally misrepresent the number of acres constituting the farm. The farm sold to *Shaffer* consisted of several smaller tracts which *Yost* held by separate deeds, all of which deeds were in his possession, and he must have known by the descriptions contained in them, and by the number of acres he paid taxes for, that the whole farm contained a much less quantity of land than 180 acres.

It appears that, after the contract with *Shaffer*, *Yost*

May Term,
1852.

SMITH
v.
STEVENS.

purchased or contracted with one *McMullen* for an adjoining tract, which he then offered to convey to *Shaffer*, in order to make up the quantity he had represented the farm sold to the latter to contain, but such an offer as this does not place him in any better position to enforce his original contract.

We are of opinion that the decree is right.

Per Curiam.—The decree is affirmed, with costs.

J. Rariden and *J. S. Newman*, for the plaintiff.

J. Perry and *J. B. Julian*, for the defendant.

SMITH and Another v. STEVENS.

In a suit by the payee against the makers of a note, the latter will not be allowed to show, by parol evidence, that a guaranty indorsed upon the note was, at the time it was made, accepted by the payee in full satisfaction of the note.

An oral agreement, even for a valuable consideration, to answer for the debt of another, is void by the statute of frauds.

Thursday,
May 27.

ERROR to the *Jennings* Circuit Court.

SMITH, J.—Debt upon two sealed notes made by *Smith*, *Belding*, and one *Edwards*, as trustees for the *Mount Sidney* steam-mill company, in favor of *Stevens*, the plaintiff below. One of the notes was for 700 dollars and one was for 300 dollars; and both were payable on or before the 25th of *December*, 1840.

It appeared that there was on the notes the following indorsement:

“We, or either of us, guarantee and bind ourselves for the final payment of the within notes” (both of the notes being on one piece of paper), “to *Thomas Stevens*, with ten *per cent.* interest *per annum* from date till paid. *F. C. Humble*, *Linzy Trowbridge*, *E. G. Trueblood*, [seal].”

Edwards pleaded bankruptcy and was discharged.

Smith and *Belding*, the other defendants, offered to prove that at the time this indorsement was made, *Hum-*

ble, Trowbridge, and Trueblood were indebted to the defendants and divers other persons constituting the said steam-mill company, which was unincorporated, and had delivered their obligation to the defendants, as trustees of said company, for the payment of 1,200 dollars; that, at the time of said indorsement, the plaintiff proposed to the defendants, who were authorized to act for the said company, that if they, the defendants, would procure *H., T., and T.* to undertake to pay the plaintiff the amount of said notes, in consideration of the said company giving up to *H., T., and T.* their said obligation for 1,200 dollars, he, the plaintiff, would accept said undertaking of *H., T., and T.*, in full satisfaction and discharge of said indebtedness of the defendants on the notes sued upon; and that the defendants did, accordingly, give up to *H., T., and T.* their obligation for 1,200 dollars, and the said *H., T., and T.*, thereupon, made said indorsement on said notes, and the plaintiff, pursuant to said agreement, accepted said indorsement and undertaking of *H., T., and T.*, in full satisfaction of the said notes of the defendants.

The Court refused to permit parol evidence of these facts to be given, and there being no other defense set up, the plaintiff had judgment.

We think the evidence thus offered was correctly excluded. The objection to it is, that it is contradictory to the written agreement of the parties as evidenced by the notes and the indorsement. It was decided by this Court in the case of *Wilson v. Black*, 6 Blackf. 509, that the legal effect of a written contract consisting both of a note and the indorsement, cannot be varied or qualified by a parol agreement simultaneous with the indorsement, and the same principle has been recognized in several other cases. See *Harvey v. Laflin*, 2 Carter's Ind. R. 477. Here the legal effect of the indorsement was not to discharge the defendants, but to render *Humble, Trowbridge, and Trueblood* liable as guarantors in case the notes were not paid by the principals.

It is clear that such evidence could not be available independently of the indorsement, because a verbal agree-

May Term,
1852.

SMITH
v.
STEVENS.

May Term,
1852.

CONAWAY
v.
SHELTON.

ment, such as was offered to be proved, would have been void under the statute of frauds.

Per Curiam.—The judgment is affirmed, with 3 *per cent.* damages and costs.

J. R. Trozell, for the plaintiffs.

J. G. Marshall, for the defendant.

CONAWAY v. SHELTON.

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3 334
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In an action for the breach of a promise of marriage, the plaintiff may prove by parol that letters passed between the parties, without producing the letters.

Instructions to the jury should not assume that facts recapitulated in them have been proved.

The plaintiff's attorneys in the present cause having been improperly allowed to argue to the jury that the fact of the defendant's having procured a change of venue was a circumstance which should weigh against him, the defendant asked the Court to instruct the jury that they had nothing to do with that fact, and that it could not properly prejudice the defendant or his cause. *Held*, that the instruction should have been given.

Case for the breach of a promise of marriage. Pleas, 1. The general issue; 2. That when the promise was made the defendant was an infant. Replication to this plea, that the defendant ratified the promise after attaining to majority, and issue thereon. After the evidence was heard, the defendant asked the Court to instruct the jury that, if the defendant was an infant when the plaintiff assumed that the promise was made, to find him guilty they must find that the promise was made while he was under age, or they could not inquire as to what he had said or done, after he became of age, that might look like a ratification of the contract. *Held*, that the instruction was properly refused.

Where there is evidence before the jury tending to establish a fact, it is the duty of the Court, where a specific instruction, correct in point of law, is asked for in relation to the fact, to give it.

Thursday,
May 27.

ERROR to the *Henry* Circuit Court.

PERKINS, J.—This was an action on the case commenced in *Rush* county by *Phebe Ann Shelton*, by her next friend, *Benjamin C. Plummer*, against *Charles Conaway*. to recover damages for the breach of a promise of marriage.

Pleas, the general issue, and a plea that the defendant, at the time of making said promise, was an infant. Replication to the plea of infancy, that the defendant ratified said promise after arriving at majority. Rejoinder, that the defendant did not so ratify. Issue. At this point a change of venue was granted, on the application of the defendant, to *Henry* county. The cause was there tried by a jury and the plaintiff obtained a verdict and judgment for 1,500 dollars. A new trial was denied.

On the trial the plaintiff was permitted to prove that letters had passed between herself and the defendant; and it was objected that this should not be done unless the letters themselves were produced in evidence.

We think the plaintiff had a right to prove by parol the fact that letters had passed between the parties. After having proved the existence of the letters, it was at her option to introduce them or not in evidence, or to prove their contents or not if they were lost. If the contents of the letters were not introduced in evidence, the fact of their existence would pass for what it was worth; but its force as tending to prove a marriage contract would be diminished, if not destroyed, by the contents of the letters being withheld.

The Court gave this instruction to the jury, the defendant objecting:

"It was not necessary that the plaintiff should prove an express promise on her part to marry the defendant; but it may be inferred from the fact of her making no objection at the time, carrying herself as one consenting and approving, receiving his visits as a suitor, writing letters to him, and such like circumstances, indicating her assent. Her readiness and willingness to perform may be proved by her conduct and expressions and preparations for the marriage."

The fault found with this instruction is, that it assumes the facts recapitulated in it to be proved, and we think the jury might so have understood it. The jury are the sole judges of what facts are proved to them in a cause; and, in this case, the Court should have charged hypo-

May Term,
1852.

CONAWAY
v.
SHELTON.

May Term,
1852.

CONAWAY
v.
SHELTON.

thetically, saying to them that if they found that such and such facts were proved, they might find a promise, &c.

The Court refused the following instruction:

"The jury have nothing to do with the fact that this case has been brought here on change of venue from the county of *Rush*. There is nothing in that fact that can legitimately prejudice the defendant or his cause."

This instruction should have been given. The attorneys for the plaintiff below should not have been permitted to use the fact of such change in argument.

The defendant asked an instruction as follows:

"In this case, if the jury believe from the evidence that the defendant, *Conaway*, was under age at the time the plaintiff assumes the contract was made, to find the defendant guilty, they must find that the contract was made by him while he was under age, or they have no inquiries to make as to what he may have said or done after he came of age that may look like a confirmation or ratification of the contract, for there is none in that case to ratify."

There was no error in refusing this instruction.

Looking at it in reference to the trial upon the general issue, it was wrong; for a promise made after the defendant was of age, without any reference to a previous one while a minor, would support the plaintiff's case under that issue.

Looking at it in reference to the trial upon the issue on the replication to the plea of infancy, it was wrong; for the defendant, by that plea, admitted the original promise while a minor, and nothing remained to be proved but the ratification.

The following instruction was refused on the ground that there was no evidence to which it could be applicable:

"Should the jury find, from the facts in evidence, that the case is made out, and that there was also seduction, it will be the duty of the jury to take into consideration, in mitigation of damages, any evidence that may appear of the easy virtue, want of chastity, or improper conduct, on

the part of the plaintiff, at the time, or after the contract was made."

May Term,
1852.

SHERMAN
v.
SHERMAN.

The only evidence that would render the instruction relèvant, was, that "the plaintiff's child was begotten at the defendant's second visit to her as a suitor, (the first having been some five months previous,) in her mother's room where the whole family were sleeping, and within arm's length of where the plaintiff's sister was, at the time, sitting with her suitor, though it is not asserted that the two latter knew of the sexual intercourse by which said child was begotten."

Where there is any evidence tending to establish a fact, its weight is for the jury, and it renders instructions upon the point relevant. We think the facts above stated amounted to some evidence for the consideration of the jury and that the instruction should have been given (1).

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

R. D. Logan and S. W. Parker, for the plaintiff.

J. Robinson, for the defendant.

(1) See *Taylor v. Huller*, 3 Blackf. 433.

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SHERMAN and Others v. SHERMAN.

Where a mortgage is given to secure the payment of a note, any act which discharges the note, discharges, also, the mortgage.

Where a note has been surrendered by the payee to one of the makers with an intention of canceling it, a delivery of the note by such maker to the payee's administrator, upon his demand, in ignorance of the makers' rights, will not revive the debt.

The surrender of a note by the payee to the maker, is *prima facie* a satisfaction or release of the debt.

A father who had made advancements to his other children, conveyed a tract of land to his sons A. and B., taking from them a note and mortgage to operate as a check upon their conduct and not to be collected, intending the land as a gift subject to the support of himself and wife. A. and B. supported the father and mother during their joint lives,

May Term,
1852.

SHERMAN
v.
SHERMAN.

and about four days before his death, the father delivered the mortgage and note to *B.*, saying that he wished him to keep them till he, the father, and the mother were dead, and then the mortgage would be void. He had often said he did not wish *A.* and *B.* to pay anything for the land, but only to support their parents. *A.* and *B.* had also supported the mother since his death. The note and mortgage were afterwards demanded of *B.* by the father's administrator and delivered up by *B.*, under protest against the rightfulness of the demand and in ignorance of his legal rights; and the administrator filed his bill for the foreclosure of the mortgage. *Held*, that the bill would not lie.

Thursday,
May 27.

ERROR to the *Jefferson* Circuit Court..

PERKINS, J.—Bill in chancery to foreclose a mortgage. The bill states that, on the 12th day of *January*, 1847, *Daniel* and *Charles B. Sherman* were indebted to *Benoni Sherman* in the sum of 800 dollars, as evidenced by a promissory note of which the following is a copy:

"\$800. Two years after date, we, or either of us, promise to pay to *Benoni Sherman*, or order, eight hundred dollars, without relief from valuation or appraisement laws, for value received. *January 12, 1847. Daniel Sherman, Charles B. Sherman.*"

That, being so indebted, they did, at the date aforesaid, execute to said *Benoni* a mortgage upon certain real estate to secure the payment of said indebtedness, which mortgage was conditioned "that if the said *Daniel* and *Charles B. Sherman* shall well and truly pay, or cause to be paid, unto the said *Benoni Sherman*, their certain promissory note of even date herewith, in favor of the said *Benoni Sherman*, for the sum of eight hundred dollars, without relief from valuation or appraisement laws, due and payable two years from the date hereof, for value received, and according to the tenor and effect thereof, then," &c.

The bill further states that the time fixed for payment has passed, and the money has not been paid; that no proceedings at law have been had for its collection; that said *Benoni* is dead, and *Shedar Sherman*, the plaintiff in the bill, is administrator on his estate. The bill prays a foreclosure, &c.

The defendants answered, admitting the note and mort-

gage, and their non-payment; the death of *Benoni Sherman*, and the appointment of the plaintiff, *Shedar*, as administrator; but they insist, in defense, that they are not, and never were, bound to pay the demand in question. They say that *Benoni Sherman* was their father; that he deeded to them, as a gift, the tract of land mentioned, but, to secure to himself and wife a maintenance during their several lives, and for no other purpose, he exacted the note and mortgage in suit; that he and his wife were supported by said defendants while said *Benoni* lived, and that his wife is still supported by them. They further say that, a short time before his death, said *Benoni* surrendered said note and mortgage to *Charles B. Sherman*, one of the defendants, to be canceled, but that, after his death, the plaintiff, as administrator, demanded them, and they were, in ignorance of the law and under remonstrance, given up to him.

May Term,
1852.

SHERMAN
v.
SHERMAN.

The usual replication was filed, and depositions were taken. The Court decreed a foreclosure of the mortgage, &c.

It sufficiently appears by the evidence that *Benoni Sherman*, deceased, was the owner of the land covered by said mortgage, and that he deeded it to his two sons, *Daniel* and *Charles B.*, taking back from them, at the time, the note and mortgage in question; that he had previously aided his other children, and that he intended the land conveyed to said *Daniel* and *Charles* as a gift, subject to the support of himself and wife; that he took the note and mortgage as a means of securing that support, and to operate as a check upon the conduct of his sons, and not to be collected; or, as he himself expressed it to one of the witnesses, four days before his death, "he had given to *Charles* and *Daniel* the place and had taken a mortgage for his support," &c., "as *Charles* was a wild, rambling, young man, and he did not know what might happen. But now, as *Charles* had married and settled, he did not hold the mortgage against the place any longer." It further appears that said *Benoni* and wife were supported by his said sons while he lived, and that

May Term,
1852.

SHERMAN
v.
SHERMAN.

his said wife had been since his death; that about four days before his death, being in good health and not contemplating his decease, he delivered said note and mortgage to his son *Charles*, with the remark that "he wished him to keep them till he (*Benoni*) and his wife were dead, and that then they would be void and dead also;" and that he had often said he did not wish his sons to pay anything for the farm, only to support their parents. It also appears that the administrator of said *Benoni's* estate, the plaintiff in the bill, demanded, as his legal right, and obtained from *Charles*, he objecting to the rightfulness of the demand, the possession of said note and mortgage, and instituted this suit for their collection.

We shall not inquire whether the delivery of the note and mortgage in this case can be supported as a *donatio mortis causa*; nor whether the support of *Benoni* and wife constitutes a consideration that will uphold their surrender. There are other principles upon which, in equity, the case can be determined.

"Acts and declarations may amount to what, in the Court of Chancery, will be equivalent to a release of a debt." 2 Spence Eq. 912.

A Court of Equity will order the delivery up and cancellation of instruments, where they are "clearly established by the proofs to have become *functus officio* according to the original intent and understanding of both parties;" and, also, "where it has been fairly inferable from the acts or conduct of the party entitled to the benefit of the deed or other instrument, that he has treated it as released, or otherwise dead in point of effect." 2 Story's Eq. p. 19.

Some of the cases in which these principles have been applied, are as follows:

In *Wekett v. Raby*, 2 Bro. P. C. 386, "Mr. *Piggot*, a short time before his death, said to his wife, who was his executrix and residuary legatee, he had *Raby's* bond which he did not deliver up as he might live to want it, but added, 'when I die he shall have it, he shall not be troubled or asked about it.' On the death of Mr. *Piggot*,

Raby asked the widow to give up the bond, on which she did not deny that the directions had been given to her, and told *Raby* he might be easy, for it was safe in her hands, and that if she married she would give it up to him. Lord *Macclesfield*, and afterwards the House of Lords, held that the executrix, who had married and sought to put the bond in suit, was trustee of the bond for *Raby*, and she was ordered to deliver it up. In *Richard v. Symes*, 2 Eq. Ca. Abr. 617; S. C. Barnard, p. 90, the facts appear to have been that the mortgagee said to the mortgagor, 'Take back your writings,' namely, a mortgage and bond, 'I freely forgive you the debt;' the mortgagor accordingly took them, and it was alleged the mortgagee at the same time made a verbal statement to the mother of the mortgagor, to the effect that he had intended to forgive the debt. Lord *Hardwicke* considered that, by the parol declaration, if proved, the debt would be extinguished, and that the heir of the mortgagee would become, by construction of law, trustee for the mortgagor." 2 Spence, 912, n. (b.) So, in *Flower v. Marten*, 2 Mylne and Craig, 474, "where a father, upon payment of the debts of his son, took a bond from the latter, and it was apparent, from all the circumstances, that the father did not intend it as an absolute security against the son, but in some sort as a check upon his future conduct, and that he did not intend, after his death, that it should be treated as a debt due from his son to his estate, or to be put in force against him; it was decreed that the bond should be delivered up by the executors to be cancelled." 2 Story, *supra*, p. 20.

Here are two classes of cases in which equity will decree the delivery up of instruments, the evidences of debt: 1. Where they were not intended, originally, to be enforced; 2. Where they were intended, originally, to be enforced, but that intention has been finally abandoned. The case under consideration falls within both these classes. In it, we may remark, the mortgage was but a security for the note, and any act that discharged the lat-

May Term,
1852.

SHERMAN
v.
SHERMAN

May Term,
1852.

SHERMAN
v.
SHERMAN.

ter, discharged the former. The note had been actually surrendered up to one of the makers; and we shall treat it as though it had never been returned to the administrator of the payee, for it was done in ignorance of the rights of the party, and without intending to relinquish any he might have, and without the consent of the joint maker; and such a return will not revive an extinguished debt nor change the liabilities of the parties in this suit. The surrender of a note is, *prima facie*, a satisfaction or relinquishment of the debt evidenced by the note. And, in the present case, all the facts go to show that the note was surrendered with a view to the relinquishment of what was, indeed, a legal demand, but one never intended to be enforced; and, also, with a view to prevent its being collected, on the decease of the payee, as a part of his estate for the benefit of his heirs. Of this there can be no doubt; and we think, on the authority of the cases cited, it is the duty of a Court of Equity to enjoin its collection for such a purpose. It is true the defendant, *Charles*, was not directed immediately to destroy the note; but the unqualified possession was given to him to continue till, on the happening of a future, but certain event, the note should become "void" and "dead," without payment; till, in short, it should "become *functus officio*, according to the original intent and understanding of both parties."

Suppose this had been a suit to compel the re-delivery of this note from *Charles B. Sherman* to *Benoni's* administrator, would it have been sustained on the facts now appearing in the record? If not, then, the present suit should not be. It will be observed that this bill is not in behalf of the widow to secure a support for her. She is not complaining; and when she does complain it will be time enough to ascertain what can be done for her. This bill is to collect the note in question for the benefit of all *Benoni's* heirs, a part of whom, he intended, should not have any of it; and, if successful, would destroy the claim of the widow to future support, as well

as deprive the defendants of their reward for the support they have given. We think the decree below should be reversed.

May Term,
1852.

THROP

v.

JOHNSON.

Per Curiam.—The decree is reversed, with costs. Cause remanded, &c.

J. Sullivan, for the plaintiffs.

J. G. Marshall, for the defendant.

THROP v. JOHNSON and Wife.

A plea to a petition for the assignment of dower, alleged that the dower of the widow was barred by a decree of the *Decatur* Circuit Court theretofore rendered, &c., but made no further mention of the decree. *Held*, that the plea was bad for not setting out the decree.

Where land is devised upon a condition subsequent, the non-performance of the condition authorizes the heirs of the devisor to enter upon the land, and thus destroy the devise; but, until the entry, those holding under the devisee are entitled to the land.

To a petition for the assignment of dower by the widow of a devisee of land devised upon a condition subsequent, a plea alleging as a defense the non-performance of the condition, but not showing that the defendant is an heir of the devisor, is bad.

Upon the hearing of a petition for the assignment of dower, the right of the petitioner to dower was established, and the Court having appointed commissioners to make an assignment thereof, instructed them to assign the same according to the value of the land at the time of the assignment, exclusive of the improvements made after the husband's alienation. *Held*, that the defendant, being the grantee of the husband, could not complain of the instruction.

An instruction to commissioners appointed to assign dower, to assign the same by metes and bounds, will be presumed to be right where the record does not contain the evidence.

ERROR to the *Decatur* Circuit Court.

BLACKFORD, J.—*Isaac M. Johnson* and *Kexia*, his wife, filed a petition in the *Decatur* Circuit Court. The object of the petition was to obtain dower in certain real estate, on the ground that one *Samuel D. Henry* died seized of the estate in fee, leaving said *Kexia* his widow. The petition alleges, *inter alia*, that said *Johnson* has married said

Thursday,
May 27.

May Term, 1852. *Kezia*, and that *Throp*, the defendant, has the legal title to said estate, by virtue of a decree in chancery.

THROP The defendant pleaded three pleas.

v. First—That said *Henry* did not die seized of said estate in fee as alleged.

JOHNSON.

Secondly—That the dower of said *Kezia* was barred by a decree of the *Decatur* Circuit Court theretofore rendered of and concerning said land, wherein said *Throp* was complainant, and said *Johnson* and wife were defendants.

The following is the third plea: That said land was held by said *Samuel D. Henry*, at the time of his death, by virtue of the last will and testament of his father, *William Henry*, deceased; that the devise was made agreeably to an article of agreement between said *Samuel* and his father, which article provided that said *Samuel* should support the widow of his father during her life. Averment, that said *Samuel* did not support said widow of his father, as he was to do by said agreement.

Replication to the first plea, that said *Samuel D. Henry* did die seized in fee of the said land.

Demurrers to the second and third pleas, and the demurrers sustained.

The issue on the first plea was submitted to the Court.

The Court found that the facts stated in the petition were true; that the land had been aliened by said *Samuel D. Henry*, in the year 1825; and that the said *Kezia* was lawfully entitled to the dower claimed in the petition.

The Court also appointed commissioners to assign the dower, and instructed them to make the assignment according to the value of the land at the time of the assignment, exclusive of the increased value caused by improvements made since the alienation of the land by said *Samuel D. Henry*. The commissioners were also instructed to set off the dower by metes and bounds.

The second plea is bad, on the ground that the decree relied on in that plea is not set out. The plea alleges that the dower was barred by the decree; but that allegation is a mere conclusion of law. The decree should

have been set out, so that the Court could have determined whether or not the dower was barred by the decree.

May Term,
1852.

THROP
V.
JOHNSON.

The third plea is also bad. By the will mentioned in the plea, *Samuel D. Henry* took the legal title to the land. If, in consequence of the article of agreement mentioned in the plea, any condition was annexed to the devise, it was a condition subsequent. Supposing there was such a condition, the non-performance thereof would have authorized the heirs of the devisor to enter on the land and thus destroy the devise. But, until such entry, those holding under the devisee are entitled to the land. *Cross v. Carson*, 8 Blackf. 138. There is no intimation in the plea, that the defendant is an heir of the devisor.

The defendant cannot complain of the instruction to the commissioners to assign the dower according to the value of the land at the time of the assignment, exclusive of the improvements made after the husband's alienation. We formerly decided that the value of such improvements was not to be taken into consideration. *Wilson v. Oatman*, 2 Blackf. 223. But since that time the question has been differently decided in *England*. *Doe d. Riddell v. Gwinnell*, 1 Adol. & Ellis, 682. The point is not, in this case, material; for, if the Court erred as to that, the error was in favor of the defendant.

The instruction to the commissioners to assign the dower by metes and bounds is objected to. The record does not contain the evidence, and we must presume that the evidence showed that the dower ought to be set off by metes and bounds.

Per Curiam.—The decree is affirmed, with costs.

J. Robinson, for the plaintiff.

May Term,
1852.

HARBERT
v.
DUMONT.

HARBERT v. DUMONT and Another.

Where parol evidence is admitted at the trial, without objection, the question of its admissibility cannot be raised on error.

The receipt of usurious interest, while the statute of 1845 enacting that usurious interest paid should not be recovered back was in force, was a benefit to the recipient and a valid consideration for an agreement to extend the time for the payment of a note.

A valid agreement by a creditor with the principal debtor, without the consent of the surety, not to sue for a limited time after the debt is due, discharges the surety.

The plaintiff who after a demurrer to a plea has been overruled, replies to the plea, waives all objection to the overruling of the demurrer.

The party in whose favor a demurrer has been decided, cannot complain of the decision.

Thursday,
May 27.

ERROR to the *Dearborn* Circuit Court.

BLACKFORD, J.—This was an action of debt commenced in *March*, 1849, by *Harbert* against *Cheek*, *Dumont*, and *Glenn*. The suit was founded on two promissory notes given by the defendants to the plaintiff. The notes were joint and several and were signed as follows: *William V. Cheek*, *Ebenezer Dumont*, *William Glenn*.

Two of the defendants, *Dumont* and *Glenn*, filed seven pleas.

First, the general issue.

The second plea is as to 70 dollars of the principal debt, and to the interest since the 11th of *May*, 1848, and to the costs. This plea alleges the receipt of usurious interest by the plaintiff on the notes at various times after they fell due, to-wit, in 1845, 1846, &c., to the amount of 70 dollars, in pursuance of various usurious agreements made by the plaintiff with *Cheek*.

The third plea is similar to the second.

The fourth plea, which is in bar of the whole action, alleges that these two defendants signed the notes as sureties of *Cheek*, which was known to the plaintiff when he took the notes; that after the notes fell due, the plaintiff, in pursuance of various usurious agreements with *Cheek* (which are described) made at different times, to-wit, one on the 15th of *May*, 1845, one on the 12th of

May, 1846, &c., gave him, *Cheek*, further time for payment, in consideration of certain usurious interest, to-wit, 10 *per cent. per annum*, paid to the plaintiff by *Cheek* at the said times of making said agreements; which agreements and payments were made without the consent of these defendants or either of them.

May Term,
1852.

HARBERT
v.
DUMONT.

The fifth plea is pleaded in bar of the whole action. It states that these two defendants were only sureties, which the plaintiff knew when he took the notes; that after the notes fell due, the plaintiff and *Cheek*, without the consent of these defendants, agreed that *Cheek* should have further time for payment of the notes, on payment of the legal interest in advance for the delay. Averment, that the interest was paid in advance and the time given without the consent of these defendants or either of them; that, during the time so given, *Cheek* was solvent, but afterwards became insolvent.

The sixth and seventh pleas are similar to the fifth.

The second, third, and fourth pleas were demurred to, and the demurrers overruled. To the second and third pleas the plaintiff afterwards replied, denying the usurious agreement and the receipt of usurious interest relied on in those pleas.

Replication to the fourth plea, that the plaintiff did not give further time for payment in manner and form as in that plea alleged.

The fifth, sixth, and seventh pleas were demurred to and the demurrers sustained.

Judgment by default against *Cheek*.

The issues of fact were tried by the Court, and judgment rendered for the defendants, *Dumont* and *Glenn*.

On the trial, the plaintiff gave in evidence the notes described in the declaration. The defendants, *Dumont* and *Glenn*, introduced evidence (which was not objected to) strongly tending to prove that they were only sureties of *Cheek*, and were known to be so by the plaintiff; that after the notes fell due, the plaintiff agreed with *Cheek* to give him further time for payment, on *Cheek's* paying cer-

May Term,
1852.

HARRERT
v.
DUMONT.

tain usurious interest; that the usurious interest was accordingly paid and the time given.

We think that the evidence was sufficient not only to prove the second and third pleas, which are to a part only of the demand, but also to prove the fourth plea, which is in bar of the whole cause of action.

The question whether parol evidence was admissible to prove these defendants to be sureties cannot be raised now. The objection should have been made below when the evidence was offered.

We have only to consider whether the issue raised by the replication to the fourth plea, which issue has been found for the defendants, is material.

The materiality of that issue depends upon two questions: first, whether the consideration of the agreements to give time was valid; and if so, then, secondly, whether the giving of the time discharged the sureties.

The consideration of the agreements was the payment of usurious interest. By the statute of 1845, which was in force when the agreements were made, the plaintiff has a right to retain that interest. Acts of 1845, p. 12. That being the case, the receipt of the interest was a benefit to the plaintiff, and a valid consideration for the agreements.

With regard to the second question, the plaintiff's counsel has certainly presented us with a strong argument to show that the sureties are not discharged by the time given to the principal. It must be admitted that a valid agreement not to sue for a debt for a limited time, cannot be pleaded in bar of an action brought for the debt within the time. *Thimbleby v. Barron*, 3 Mees. and Welsby, 210. But still the law is well settled, that such an agreement by a creditor with his principal debtor, discharges the surety. It is said that such agreement ties up the hands of the creditor, because, if he breaks it, he may be sued for damages. Per *Parke*, Baron, in *Thimbleby v. Barron*, *supra*. Lord *Truro*, in discussing this subject very recently, uses the following language: "But

it may be said that the effect of the contract is not to deprive the creditor of the power of suing the debtor at law, as the covenant not to sue could not be pleaded in bar to an action for the debt, although it might subject the creditor to an action for suing contrary to his covenant. To this it may be replied, that liability to such action has a tendency to operate on, and to fetter, the discretion of the creditor in determining whether to sue the debtor or not. If the creditor had not fettered his discretion by the covenant, the determination or exercise of the discretion would be regulated by a consideration of the expediency of suing the debtor under any existing circumstances; but the existence of such a covenant introduces a new and important circumstance, operating upon the expediency of suing or not, because the creditor is to be supposed to be stimulated by views of his own interest merely, but, by reason of the existence of the covenant, he has to estimate the possible consequence, in point of damages, for breach of the covenant, against the possible advantage of suing; and the evil likely to result from the former may, in his estimation, outweigh the advantage to be derived from the latter; and it is not beyond doubt that the state of things created by the creditor has changed the situation of the surety, and deprived him of an advantage which he would otherwise have enjoyed." *Owen v. Homan*, 3 English Law and Equity Reports, 112, 122, 123.

We have no doubt, therefore, but that the issue raised by the replication to the fourth plea is material. The finding of that issue for the defendants, *Dumont* and *Glenn*, puts an end to the plaintiff's action against them.

As the plaintiff, after his demurrers to the second, third, and fourth pleas were overruled, filed replications to those pleas, he waived all objection to the overruling of those demurrers.

The demurrers to the fifth, sixth, and seventh pleas having been decided in the plaintiff's favor, he cannot, of course, complain of that decision.

May Term,
1852.

HARBERT
v.
DUMONT.

May Term,
1852.

THE STATE
v.
MANN.

Per Curiam.—The judgment is affirmed with costs.
J. Ryman, J. Morrison, and S. Major, for the plaintiff.
E. Dumont and P. L. Spooner, for the defendants.

THE STATE, on the Relation of CRANDALL, v. MANN and Others.

Suits upon the official bonds of public officers are within the provisions of ss. 5 and 10 of c. 47 of the R. S. 1843.

Debt upon the official bond of a justice of the peace. Damages assessed at 14 dollars and judgment for the plaintiff accordingly, and against the relator for costs. There appearing to have been no reduction by way of set-off, *held*, that the judgment against the relator for costs was right.

When a judgment has been rendered for the plaintiff, he cannot complain that a demurrer to a plea was overruled, which, if valid at all, was a bar to the whole action.

Friday,
May 28.

ERROR to the *Delaware* Circuit Court.

SMITH, J.—This was an action of debt brought by the plaintiff in error against *Mann* and the securities on his official bond as a justice of the peace. Two breaches were assigned. The first was, that *Crandall* had obtained a judgment against one *Veach*, and that *Mann*, the justice, had unlawfully neglected to issue an execution thereon for the space of six months. The second breach alleged that *Mann* issued an execution on said judgment, which was levied on certain articles of personal property, and returned without a sale being made; and that the justice neglected to issue a *venditioni exponas* for the space of one month, whereby the relator lost the benefit of his judgment.

Several pleas were filed by the defendants, and the cause was submitted to the Court for trial, who found the issues for the plaintiff and assessed his damages at 14 dollars. Judgment was accordingly rendered in his favor

for that amount, and a judgment was rendered in favor of the defendants for their costs.

The plaintiff contends that the Court erred in giving judgment against the relator for costs. The Revised Statutes of 1843 confer exclusive jurisdiction upon justices of the peace, in all actions of debt, covenant, or assumpsit, where the amount in controversy does not exceed 50 dollars, and provide that when any such action is brought in the Circuit Court, the plaintiff shall be adjudged to pay all costs incurred therein. Chapter 47, ss. 5 and 10.

We are of opinion that suits upon the official bonds of public officers, when the damages claimed are less than 50 dollars, are within these provisions. *Ib.*, s. 8. The amount recovered, as there does not appear to have been any reduction by way of set-off, is the proper criterion of the amount in controversy. *Dayton v. Hall*, 8 Blackf. 556 (1.)

The plaintiff also contends that the Court erred in overruling a demurrer to one of the pleas. He could not, however, have been injured by this decision, because the plea, if valid at all, was a bar to the whole action. The record does not, indeed, show that issues were joined on any of the pleas, except that of *nul tiel record*. It is evident that the other pleas were disregarded, or, if issues were joined upon them and submitted to the Court, such issues were found for the plaintiff.

Per Curiam.—The judgment is affirmed with costs.

W. Henderson, for the plaintiff.

W. March, for the defendants.

(1) See, also, *Edmonds v. Paskins*, 8 Blackf. 196; *Ham v. Gregg*, 1 Carter's Ind. R. 81; *Nelson v. The State*, 2 id. 249. Also, R. S. 1852, vol. 2, p. 126.

HANNA V. SPENCER.

In a suit upon a promissory note, a guarantor of the solvency of the maker is not a competent witness to prove that the note was executed without a consideration.

May Term,
1852.

HANNA
v.
SPENCER.

May Term,
1852.

HANNA
v.
SPENCER.

Friday,
May 28.

ERROR to the *Allen* Circuit Court.

SMITH, J.—Assumpsit by the plaintiff in error against the defendant in error upon a promissory note for the payment of 93 dollars and 40 cents. Pleas: 1. Non assumpsit; 2. That the note was made upon the settlement of a certain cost-bill, which *Hanna*, as a marshal, claimed to be due him by *Spencer*, and that there was a mistake in said settlement, and nothing was, in fact, due; 3. Matters of set-off under the common counts.

The cause was submitted to a jury, who found a verdict for the defendant, and a motion for a new trial having been overruled, judgment was rendered accordingly.

Upon the trial *Hugh McCullough* was sworn as a witness for the defendant, but, before testifying in the case, he was questioned upon his *voir dire* by the plaintiff. He stated that the note sued upon was executed by *Spencer* and given to him to be sent to the plaintiff, and that he enclosed the note in a letter directed to the plaintiff at *Indianapolis*. He further stated that he did not recollect the precise language used in the letter, but believed, and still believes, he made himself liable, and bound himself for the payment of the note, in case *Spencer* was unable to pay it. The plaintiff then objected to the witness being permitted to testify on behalf of the defendant, on the ground that he was interested, but the Court overruled the objection, and the witness then proceeded to give certain evidence which was material to support the second plea of the defendant.

We think the objection to this evidence should have been sustained. The substance of the statement of the witness, as to the contents of the letter sent by him to the plaintiff, was, that he had therein or thereby guaranteed the payment of the note. No objection appears to have been made by the defendant to this mode of proving the contents of the letter, and if the witness was right in supposing himself liable to pay the note, if *Spencer* could not, and we must presume he was from his own state-

ment, he was interested in proving that it was given without consideration. May Term,
1852.

In the case of *Prather v. Lentz*, 6 Blackf. 244, it was held, that the assignor of a note was incompetent to prove payment by the maker to the assignee, in a suit by the latter against the maker, because his contract of warranty would thereby be discharged. In this case we must suppose that the witness only guarantied the solvency of the maker of the note, and not, as in the case of an assignor, the validity of the note itself, and, therefore, if he could defeat the suit of the payee against the maker by proving that the note was given without consideration, he would be released from his own liability. McCARTNEY
v.
THE STATE.

Per Curiam.—The judgment is reversed, and the verdict set aside, with costs. Cause remanded, &c.

O. H. Smith and *S. Yandes*, for the plaintiff.

D. H. Colerick and *J. G. Walpole*, for the defendant.

McCARTNEY v. THE STATE.

8 353
157 60

Upon the trial of a prisoner on an indictment for forgery in passing a counterfeit bank-bill, the Court allowed a witness to state, in answer to a question of the prosecuting attorney, the names of persons who were competent judges of the genuineness of bank-bills. *Held*, that there was no error in this.

Upon the trial of such an indictment the state may prove, in order to show the defendant's criminal intent, that about the time the bill was passed, he uttered other counterfeit bills on the same bank and on other banks; and the fact that indictments against the defendant are pending, or have been tried, for the passing of such other notes, will not affect the admissibility of the evidence.

The state may also prove what the defendant said at the time of passing the bill described in the indictment, in regard to it.

At the trial upon such an indictment, the Court instructed the jury that if they were satisfied that the defendant uttered in payment and put away the note described in the indictment; that it was forged and false, and that the defendant knew it to be so, and put it upon the person named in the indictment, with intent to defraud him; no other proof of the ex-

May Term,
1852.

McCARTNEY
v.
THE STATE.

Friday,
May 28.

istence of the bank upon which it purported to be, was necessary.
Held, that the instruction was correct.

ERROR to the *Marion* Circuit Court.

PERKINS, J.—Indictment for forgery. Conviction in the Circuit Court.

The points made are:

1. Whether the Court erred in refusing to quash the indictment on the ground that it does not charge that the forged bank-bill, alleged to have been passed, was passed as a true one. There was no error in refusing for this reason to quash, as the indictment does charge the bill to have been uttered and paid as true.

2. Whether the Court erred in permitting the prosecuting attorney to ascertain from a witness on the stand the names of persons who were competent judges of the genuineness of bank-bills. There was no error in this.

3. Whether the Court erred in permitting proof on the trial, to show knowledge on the part of the defendant of the falsity of the bill described in the indictment, that, on the day said defendant passed the bill, and on the day following, he passed to other persons counterfeit bills on the same and other banks, for the passing of which other indictments had been found, some of which were pending, and on one of which he had been tried and acquitted. The law is well settled that the uttering of other counterfeit notes of the same kind with that charged in an indictment, and about the time that it was passed, may be given in evidence, on the trial of the indictment, to prove guilty knowledge. 1 Russ. on Cr. 85. 2 id. 384, 697. We can see no reason why the fact that indictments had been found, or that convictions or acquittals had been had upon them, should affect the admissibility of such utterings. Neither the indictments, nor the records of conviction or acquittal, need be, nor, it strikes us, (though the point is not for decision in this case,) should be, given in evidence; but the facts and attendant circumstances alone of the utterings as though no indictments had been found. Nor do we think that the fact that some of these

other counterfeit or false bills purported to be upon banks different from that on which the indictment being tried was based, should render the evidence inadmissible. It might affect its force, but not, we think, its competency. The fact that a person had passed one counterfeit note on the state bank of *Indiana* about the time of his passing one such note on the state bank of *Ohio* might tend, but in a very slight degree, to prove that the person knew the *Ohio* note to be counterfeit; but if a person should pass several counterfeit notes on the state bank of *Indiana* about the time he should pass, or be in possession of, counterfeit notes on the *Ohio* or any other bank, every one would say, according to the usual rules of judging of human conduct and intentions, that it conduced strongly to show that the party knew all his counterfeit paper to be such, and that he was making a business of passing such paper. We think the evidence in question admissible to prove guilty knowledge, but its weight with the jury would, of course, depend on the circumstances of the case. See *United States v. Roudenbush*, 1 Bald. C. C. Rep. 514.—*State v. Houston*, 1 Bailey, 300.—*Spencer v. The Commonwealth*, 2 Leigh, 751.—*State v. Petty*, Harper, 59.

May Term,
1852.

McCARTNEY
v.
THE STATE.

4. Whether the Court erred in permitting proof of what the defendant said at the time of passing each of said notes, in regard to it. There was no error in this. His declarations were a part of the *res gestæ*.

5. Whether the Court erred in giving the following instruction to the jury:

"If the jury are satisfied that the defendant uttered in payment, and put away, the note described in the indictment; that it was forged and false; and that the defendant knew it to be so, and put it upon the person named in the indictment with intent to defraud him, no other proof is necessary of the existence of the bank upon which it purported to be."

Our statute says, p. 967, s. 28, that every person who shall utter or pay, &c., "any false, forged, or counterfeit bank-note," &c., shall be deemed guilty of forgery. The

May Term,
1852.

PRATHER
v.
STATE BANK.

note would certainly be false if there was no such bank in existence as that on which it purported to be. This point, however, is settled by authority in accordance with the instruction in question. *The People v. Peabody*, 25 Wend. 472.—Note to R. S. p. 966.—*United States v. Mitchell*, 1 Bald. C. C. Rep. 366. The Court committed no error.

Per Curiam.—The judgment is affirmed with costs.

R. L. Walpole, for the plaintiff.

D. S. Gooding, for the state.

PRATHER v. THE STATE BANK.

The clerk of a Circuit Court has no right to receive payment of a judgment otherwise than in gold and silver, without the authority of the owner of the judgment.

An offer by a creditor to his debtor to accept a thing in payment of the debt upon a condition which is not assented to by the debtor nor waived by the creditor, does not amount to an acceptance.

The agent of a judgment-debtor, residing in *Jennings* county, sent to the creditor at *Madison*, notes of the state bank and treasury notes to be received at par in payment of the judgment, but no direction was given as to what should be done with the notes in case of the creditor's refusal thus to accept them. The latter refused to accept them at par, and promptly notified the agent of the non-acceptance, requesting further directions, but retained them for about two months, and then returned them. *Held*, that the delay could not be construed to imply an acceptance of the notes in payment of the judgment.

Friday,
May 28.

APPEAL from the *Jennings* Circuit Court.

PERKINS, J.—Bill in chancery by *Hiram Prather* against the *State Bank of Indiana*, *John Walker*, *Achilles Vawter*, and *Alanson Andrews*, praying an injunction upon the collection of a judgment at law. Answers and replications were filed. No depositions were taken. The cause was submitted upon the bill, answers, and exhibits, and the bill was dismissed. The facts in the cause are, that at the *March* term, 1841, of the *Jennings* Circuit Court,

the said *State Bank*, for the use of her branch at *Madison*, obtained a judgment against said *Prather, Walker, Vawter, and Andrews*, for 548 dollars and 62 cents, and costs; that on the 20th day of *January*, 1842, a *fi. fa.* was issued on said judgment and placed in the hands of the proper sheriff; that on the 26th of *February* following, and while said execution was in the hands of the sheriff, said *Prather* paid the amount of said judgment to said *John Walker*, a co-defendant therein, and the clerk of said *Jennings Circuit Court*, in manner specified in the following exhibit, to-wit:

May Term,
1852.
PRATHER
v.
STATE BANK.

"I, *Hiram Prather*, have this day paid to *John Walker*, clerk of the *Jennings Circuit Court*, five hundred and eighty dollars and six cents, the amount of a judgment and interest against me in favor of the *State Bank of Indiana*—one hundred and twenty-five dollars in state bank paper and the balance in treasury notes. I do bind myself to make the amount bankable and to keep the said *Walker* harmless. *February 26, 1842. Hiram Prather.*"

The clerk executed to *Prather* this receipt, viz.:

"In the *Jennings Circuit Court. State Bank of Indiana v. John Walker, Achilles Vawter, Hiram Prather, and Alunson Andrews.* Assumpsit. Received of *Hiram Prather* five hundred and eighty dollars and six cents, the full amount of the above judgment and interest, costs excepted, this 26th *February*, 1842. *John Walker*, clerk."

Said clerk also made the following entry under the judgment: "The above judgment is paid off, costs excepted. *February 26, 1842. \$580.06.*"

Prather subsequently paid the costs.

Soon after receiving said paper from *Prather, Walker* forwarded it, by *John Lodge*, a conductor on the *Madison* railroad, to the branch bank at *Madison*. On its delivery to the bank, the cashier wrote to said *Walker* as follows:

"*Madison, March 1st, 1842.* Sir: We received yesterday, by Mr. *Lodge*, the package of scrip and *Indiana* notes. I think Mr. *Prather* ought not to expect us to take those notes at par. They are now at a discount of 25

May Term,
1852.

PRATHER
v.
STATE BANK.

per cent. To get bankable money we will have to lose that. I will be willing to lose a part, but Mr. *Prather* ought also to lose a part. You know that we lent him bankable money, at six *per cent.* interest, which he pledged himself to pay to us without renewal; but he failed, and we have had to employ attorneys at a loss of five *per cent.* to us; so that I really think he ought to lose a part. Please write to me on the subject as soon as you can. Very respectfully, *J. F. D. Lanier.*"

The date and contents of the response to this letter do not appear, but it seems that in the course of a couple of months, *Walker* wrote requesting a receipt for the paper as a satisfaction of the judgment; in answer to which, Mr. *Lunier* immediately replied that it would not be so received, and returned the package. *Walker*, instead of redelivering it to *Prather*, subsequently appropriated it to his own use.

Nothing further appears to have been done till 1845, when the bank at first brought suit on the official bond of *Walker*, the clerk, but afterwards dismissed it and procured a new execution on the judgment against *Prather* and his co-defendants, whereupon this bill for an injunction was filed. *Walker* is insolvent.

Admitting, (without deciding,) for the purposes of this case, that the clerk possessed the same authority in regard to it as though he had personally no interest in the cause; and that he had the right to receive payment of the judgment while an execution was in the hands of the proper officer for its collection, still he had not, as clerk, the power to receive payment of said judgment in anything but gold and silver, without a previous authority from the plaintiff to do so. No clerk, nor sheriff, nor constable, as such, has a right, under the constitution and law, to receive payment of a judgment in anything but the legal currency of the country. *Griffin v. Thompson*, 2 How. U. S. Rep. 244.—*McFarland v. Gwinn*, 3 id. 717. No previous authority to receive paper is pretended to have been given in this case. The transaction, therefore, between *Prather* and

Walker, by which the former delivered to the latter an amount of bank notes and scrip nominally equal to the amount of the judgment, was not a payment of said judgment. But though there was no payment at the time, still, the bank may have ratified the act of the clerk afterwards and accepted the paper in payment. This ratification may have been express, or it may be implied from circumstances.

We must inquire whether it has taken place. There has been no express acceptance of the paper. On the contrary, there was an express refusal to unconditionally accept it when sent to the bank; and a conditional acceptance, the condition not being afterwards assented to by one party nor waived by the other, amounts to no acceptance. And there was afterwards an absolute refusal to accept when the paper was returned. There is no circumstance from which an acceptance can be implied except the delay of the bank in returning the paper. The record does not fix the period of this delay, but the plaintiff claims it to have been two months. Admit it, and we think no negligence imputable to the bank. *Prather* had delivered to *Walker* that which he knew was not a legal tender in payment of the judgment, with the view of having *Walker*, as his agent, procure the acceptance of it by the plaintiff in payment. *Walker* sent the thing delivered to the bank, but gave no direction as to the disposition to be made of it in case of a refusal by the bank to accept it. It was his duty to have given such direction. He could not require the bank to send back the paper, which she had never asked to be sent to her, at her own risk; and the bank would not, perhaps, have been justified, in the absence of instructions, in sending it back at the risk of *Walker*. On her refusal to accept the paper, therefore, she would properly suffer it to remain in her custody till it was called for by him. And it was the duty of *Prather* to look to the conduct of his agent, and see that the business was properly transacted; for, as we have said, *Walker* had not the power to receive this paper, as clerk, in payment of the judgment, and, hence

May Term,
1852.

PRATHER
v.
STATE BANK.

May Term,
1852.

MANCHESTER
v.
DODDRIDGE.

could only receive it as the agent or depository of *Prather*. If *Prather* has been negligent, as is evidently the case, in calling his agent to account, he must suffer the consequence. The bank, immediately on the paper being left with her, notified *Walker* that it would not be accepted at par, and requested his further direction. She returned the deposit as soon, perhaps sooner, than she was required to.

We think the bill was rightly dismissed.

Per Curiam.—The decree is affirmed, with costs.

J. G. Marshall, for the appellant.

S. C. Stevens, for the appellee.

MANCHESTER and Another v. DODDRIDGE.

3	300
134	348
136	26

In disseizin, the statute of limitations in force when the suit was commenced and tried, governs the case.

A person in possession of land, with the consent of the owner, under a contract of purchase which is not completed, is a mere tenant at will.

Such tenancy determines by the death of the lessor.

The possession of one co-parcener, *eo nomine*, as co-parcener, is the possession of the others.

To establish an ouster, proof of an actual ouster is not necessary.

A. died in 1822, seized in fee of a tract of land in this state, leaving *B.*, his son, and *C.* and *D.*, the children of a deceased daughter, and others, his heirs at law. *B.* was, at that time, in possession of the land as a tenant at will. He continued in possession afterwards, claiming the land under the last will of *A.*, which turned out to be invalid, and made lasting and valuable improvements on the premises, under a constant claim of exclusive title, until his death, which occurred in 1841; after which his widow continued in possession of the land, it having been assigned to her in 1845 as her dower. The possession of *B.* and his widow had been quiet and undisturbed. *C.* was born in December, 1806, and *D.* in December, 1810, and they brought this suit against the widow of *B.* in August, 1847, for certain undivided shares of the land, as representatives of their mother. Held, that, under this state of facts, the jury was authorized to presume an adverse possession by *B.* of sufficient length, under the statute of 1846, to bar the action.

The verdict of a jury will not be disturbed on account of improper evidence having been admitted, if the other evidence admitted was sufficient to justify it.

Where the verdict is right, according to the evidence, it will not be examined whether the instructions given to the jury were correct.

May Term,
1852.

ERROR to the *Wayne* Circuit Court.

MANCHESTER
v.

BLACKFORD, J.—The plaintiffs in error brought an action of disseizin against the defendant in error for certain undivided shares of real estate in *Wayne* county. The suit was commenced in *August*, 1847.

DODDRIDGE.

Friday,
May 28.

Pleas—1st, not guilty; 2dly, the cause of action accrued more than twenty years next before the commencement of the suit.

Verdict and judgment for the defendant.

The facts relative to the plaintiffs' title are as follows:

The land in controversy originally belonged to one *Philip Doddridge*. He had, among other children, one daughter, named *Nancy*, who, in 1806, married one *Benjamin Manchester*. The plaintiffs are two of the children of that marriage. One of the plaintiffs, *James*, was born in *December*, 1806, and the other, *Isaac*, was born in *December*, 1810. The said *Nancy*, mother of the plaintiffs, died in *April*, 1813. The said *Philip*, grandfather of the plaintiffs, died in 1822. He, said *Philip*, at the time of his death, resided on the land, having the legal title to the same.

There can be no doubt of the plaintiffs' right, as heirs at law of *Philip Doddridge*, to recover in this suit, unless they are barred by lapse of time.

The facts relative to the defense of the statute of limitations are as follows:

Previously to 1818 (the precise time is not shown) said *Philip Doddridge*, being the owner and occupier of said land, made a verbal bargain respecting it with his son *John*. By that bargain, *John* let his father have other property in exchange for said land. In pursuance of that bargain, *John* removed to said land; he and his father occupying separate cabins on the same until his father's death.

The said *Philip Doddridge* left a last will, by which he devised said land to said *John*; but the devise was not valid, the will being attested by only one witness. There

May Term,
1852.

MANCHESTER
v.

DODDRIDGE.

were in the will several bequests of personal property, and said *John*, who was appointed sole executor, proved the will.

Soon after his father's death, *John* claimed the land as being devised to him; but the will being defective as aforesaid, he procured releases for their shares in the land from some of the heirs, but not from the plaintiffs.

After *John* came to reside on said land, and during his father's lifetime, he, *John*, cultivated, managed, and improved the land as if it were his own. In 1817, when *John* and his father were both living on the land, there were about 25 or 30 acres partially cleared and fenced. The said *Philip Doddridge* was then a feeble old man, and appeared to be maintained by *John*. At the time of *Philip's* death, there were about 40 acres of the land cleared. After *Philip's* death, *John* continued to occupy the land, and managed, and cultivated, and improved it as his own, and claimed it to be his own, until his death in 1841. There were, at the time of *John's* death, 80 or 90 acres of the land improved; the most of the improvements having been made by him. The rents and profits are worth from 140 to 180 dollars a year. The defendant is the widow of said *John*, and has remained in possession of the land since his death. This land was, in 1845, assigned to the defendant as her dower.

The statute of limitations of 1846 was in force when this suit was commenced and when it was tried. That statute, therefore, governs the case. *Nepean v. Doe*, 2 M. & W. 894. *Doe v. Millet*, 11 Adol. & Ell., N. S., 1048. It is as follows: "Every real, possessory, mixed, or other action for the recovery of any lands, tenements, or hereditaments, shall be brought or commenced within twenty years next after the right of entry upon or cause of action for such lands, tenements, or hereditaments, shall have accrued and not afterwards: Provided, that if at the time when such right of entry or cause of action shall first accrue, the person entitled thereto shall be within the age of twenty-one years, or out of the United States, insane, idiot, or a married woman, such person claiming

by, from, or under him or her, may bring an action at any time within five years from and after such disability shall cease or be removed." Acts of 1846, p. 95.

May Term,
1852.

MANCHESTER
v.
DODDRIDGE.

To see whether this statute applies to the present case, we must ascertain when the cause of action first accrued.

There was no adverse possession during the lifetime of *Philip Doddridge*, because it was with his consent, and under a contract, which was never completed, for the purchase from him, that his son *John* entered into possession. *John* was, under those circumstances, a tenant at will to his father. There is no doubt, says Baron *Parke*, that if there be an agreement to purchase, and the intended purchaser is, thereupon, let into possession, such possession is lawful, and amounts at law, strictly speaking, to a bare tenancy at will. *Doe v. Stanion*, 1 M. & W. 695.

Upon the death of *Philip Doddridge*, in 1822, his son *John's* tenancy at will was determined, and the land descended to said *John* and the plaintiffs, with some others, as the heirs-at-law of the deceased. The said *John* and the plaintiffs then became co-parceners. *John* being in possession at the death of his father, that possession was, *prima facie*, the possession of the plaintiffs, because the possession of one co-parcener, *eo nomine*, as co-parcener, is the possession of the others. If, however, there was an ouster of the plaintiffs by said *John*, a cause of action, in consequence of the ouster, accrued to the plaintiffs. There was no positive proof of an actual ouster, nor was such proof necessary. It was for the jury to say whether, from the length of time of *John's* sole occupation and that of the defendant under him, with the other evidence on the subject, they would presume that *John*, soon after his father's death, had ousted the plaintiffs. There is a case on this subject in which Lord *Mansfield* uses the following language: "It is very true that I told the jury, they were warranted by the length of time in this case, to presume an adverse possession and ouster, by one of the tenants in common, of his companion; and I continue still of the same opinion. Some ambiguity seems to have arisen

May Term,
1852.

MANCHESTER

V.

DODDRIDGE.

from the term *actual ouster*, as if it meant some act accompanied by real force, and as if a turning out by the shoulders were necessary. But that is not so. A man may come in by a rightful possession, and yet hold over adversely without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster." The judge said further—"The question then is, whether the possession in this case, after the death of *Stevens*, in the year 1734, that is, after the particular estate ended, was a possession as tenant in common, *eo nomine*, or adverse. It is a possession of near forty years, which is more than quadruple the time given by the statute for tenants in common to bring their actions of account if they think proper, namely, six years. But in this case no evidence whatsoever appears of any account demanded, or of any payment of rents and profits, or of any claim by the lessors of the plaintiff, or of any acknowledgment of the title in them, or in those under whom they would now set up a right. Therefore, I am clearly of opinion, as I was at the trial, that an undisturbed and quiet possession for such a length of time is a sufficient ground for the jury to presume an actual ouster, and that they did right in so doing." *Doe v. Prosser*, Cowper, 217.

There was in that case a possession of near forty years. It does not, however, follow but that the undisturbed possession of a co-parcener or tenant in common for a shorter period might raise a presumption of an ouster of his companion. Mr. *Preston*, in alluding to this subject, says: "It is also a rule of law that the seizin of one joint tenant is the seizin of his companions as well as of himself. The same rule is applied to co-parceners and tenants in common. The possession of one of them is constructively the possession of all; and hence it seems to follow, that possession or seizin of one will be the seizin of others as against all strangers; and the possession of one will constructively be held for the benefit of himself and of his companion. To disseize his companions there must be an actual ouster, or there must be such acts as are con-

structively equivalent to an ouster; as the denial of right to the rent of any part, or the possession of any part, of the land, *or an exclusive possession for a long time*, so as to afford the presumption of a disseizin. In modern times, the rule has been relaxed at some periods, and enlarged at other periods, in deciding on the point of ouster by one joint-tenant, tenant in common, or co-parcener, of his companions." 2 Preston on Abstracts, 291.

May Term,
1852.
MANCHESTER
v.
DODDRIDGE.

We are of opinion that, in the case before us, the quiet and undisturbed possession of *John Doddridge*, and, after his death, of the defendant, for about twenty-five years, that is, from soon after the death of *Philip Doddridge* until the commencement of this suit, taken in connection with the other evidence on the subject, authorized the jury to presume an ouster of the plaintiffs by their co-parcener, *John Doddridge*.

It must be considered, therefore, that the plaintiffs' cause of action accrued about twenty-five years before they brought their suit. At the time of the ouster, the plaintiffs were minors; but the eldest came of age about twenty years and the youngest about sixteen years before they brought the suit. According to the statute of limitations to which we have referred, actions like the present are barred where twenty years have elapsed after the cause of action accrued, and, in case of a disability, after the lapse of five years from the time the disability ceased. We must consider, therefore, that the evidence in this case shows that the plaintiffs were barred by the statute of limitations.

The judgment is objected to on the ground that the defendant was permitted to prove certain declarations of *John Doddridge* relative to the nature of his possession. But supposing the evidence of those declarations to have been inadmissible, their admission will not affect the case. The other evidence is sufficient to justify the verdict.

The judgment is also objected to on account of certain instructions given to the jury. But as we are of opinion that the verdict, according to the evidence, is right, it is not necessary to examine the instructions.

May Term,
1852.

GREGG
v.
STRANGE.

Per Curiam.—The judgment is affirmed with costs.
J. S. Newman, for the plaintiffs.
J. Rariden, for the defendant.

GREGG v. STRANGE.

Where land has been appraised and sold at sheriff's sale subject to alleged incumbrances which had actually been discharged before the purchase, the purchaser cannot be compelled to take the land at the sum of the price bid and the amount of such supposed incumbrances.

A sheriff's return that he has executed a deed of land to a bidder, does not conclude the latter from showing the contrary.

Saturday,
May 29.

ERROR to the *Hendricks* Circuit Court.

SMITH, J.—This was a proceeding on notice and motion to have satisfaction entered upon a judgment.

Gregg obtained a judgment against *Strange* in April, 1842, for 609 dollars. A *venditioni exponas* issued in October, 1848, to sell certain real estate of *Strange*, which had previously been levied upon to satisfy said judgment, upon which the sheriff made return that after having the premises appraised under the law of 1841, he sold the same to one *Wygant* for 50 dollars, that being more than one-half the appraised value, after deducting all prior liens, and that *Wygant* being the agent for the judgment-plaintiff, a credit for the sum bid was entered on the judgment, and a deed was executed to *Wygant*.

The land was appraised at 2,400 dollars, and the incumbrances were stated in the report of the appraisers to be 2,557 dollars and 25 cents. The appraisement was made on the 2d of March, 1849, and the sale was made on the same day.

Strange having given the judgment, appraisement, and return of the sheriff in evidence, then proved that, prior to the 2d day of March, 1849, all the liens taken into account by the appraisers had been discharged, except about 800 dollars.

Gregg then proved, by a witness introduced by him, that a short time after the sale the sheriff called on the witness and requested him to draw a sheriff's deed for the land to *Wygant*, but upon examining the *venditioni exponas* and the notices of sale, it was found that there was a variance between the description of the land in the writ and in the notices, and no deed was ever made either to *Wygant* or to *Gregg*. This evidence was objected to but it was admitted.

May Term,
1852.

MARTIN
v.
BARLOW.

This being all the evidence, the motion of the plaintiff was sustained, and it was ordered that the judgment be entered satisfied.

We are of opinion that the facts disclosed do not show a satisfaction of the judgment. The mistake made in selling upon the supposition that incumbrances existed which did not exist, might afford grounds for setting aside the sale, but the purchaser could not be compelled to take the property at a price consisting of the amount of his bid and the amount of such of the incumbrances as had been removed.

The sheriff's return was only conclusive against himself, and would not preclude a bidder from showing that he had received no deed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. S. Harvey, J. Morrison, and S. Major, for the plaintiff.

C. C. Nave, for the defendant.

MARTIN v. BARLOW, Administrator.

In an action of assumpsit by an administrator for a quantity of charcoal delivered and money lent by the intestate to the defendant, the plaintiff proved the first item clearly, and, in order to prove the latter, introduced a witness who testified that he heard the defendant tell the intestate, at, &c., that if the latter would advance the money and purchase iron for a wagon, he would put the iron on the wagon, sell the wagon, and pay

May Term,
1852.

MARTIN
v.
BARLOW.

the intestate what he owed him; and that the intestate purchased and paid for the iron and delivered it to the defendant. The witness was the holder of a claim against the intestate's estate, but it did not appear that the estate was insolvent. The jury found for the plaintiff the said items of indebtedness, with interest till the giving of the verdict. *Held*, that the jury were authorized to infer that the intestate bought iron enough to iron the wagon. *Held*, also, that the jury were authorized to allow interest on both items to the time of giving their verdict. *Held*, also, that the witness was competent.

Saturday,
May 29.

ERROR to the Decatur Probate Court.

SMITH, J.—This was an action of assumpsit commenced by *Barlow*, administrator of *Isaac Short*, against the plaintiff in error. The declaration alleges that *Martin* and one *Montgomery*, as partners, were indebted to *Short*, in his life-time, 99 dollars and 35 cents, for charcoal sold and delivered, and 13 dollars for money lent and advanced.

Martin appeared and pleaded separately four pleas, one of which was non assumpsit. The cause was submitted to a jury, and the plaintiff obtained a judgment for 148 dollars and 50 cents damages.

The item of 99 dollars and 35 cents for charcoal was clearly proved. To sustain the item for money lent and advanced, the plaintiff introduced a witness who testified that he heard *Montgomery* tell *Short*, at a time when *Martin* and *Montgomery* were keeping a blacksmith's shop as partners, that if *Short* would advance the money and purchase iron for a wagon, he, *Montgomery*, would put the iron on a wagon, sell the wagon, and pay *Short* what he owed him; and that *Short* did purchase the iron, pay for it, and deliver it to *Montgomery*.

We think this evidence was sufficient to justify the jury in finding that there was a sufficient quantity of iron bought to iron a wagon, and, therefore, to find the cost or amount of money advanced for that purpose, within the amount charged in the declaration.

The amounts due for these two items, namely, the coal and the money advanced for iron, with interest thereon up to the time of the judgment, would amount to the damages found by the jury, and from the time those

sums had been due, and from the fact that *Short* had been required to advance money for iron, in order to obtain payment of the debt before due to him, we think the jury were justified in giving interest for a vexatious delay of payment under the statute.

One *Kercheval*, a witness for the plaintiff, was objected to on the ground that he was incompetent from interest. He admitted that he had had an account or claim against *Short's* estate, but said he had balanced his books and did not expect to obtain anything, because he was unable to prove his account. As there was no evidence of insolvency, it does not appear that the witness had any interest in increasing the assets, and the objection made to him is untenable.

Several instructions requested by the defendant were refused on the ground that they were irrelevant. We do not think that the Court erred in refusing these instructions, or that those that were given are objectionable.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

A. Davison, for the plaintiff.

J. Robinson, for the defendant.

May Term,
1852.

THOMAS
v.
REISTER.

THOMAS v. REISTER, Administrator.

The administrator of the legal holder of a note, has the right to assign it. In a suit brought upon a note by the assignee of an administrator, a plea alleging that the right of the administrator to make the assignment had ceased before he made it, is a special plea of non-assignment, and must, under the R. S. 1843, be verified by oath.

When the general issue and a special plea are filed to the action, and the matter alleged in the special plea is admissible under the general issue, the defendant cannot complain that a demurrer to the special plea was improperly sustained.

While the rule of practice in the Supreme Court was, that objections to evidence should be pointed out at the trial, or otherwise the overruling of them could not be assigned for error, objections were made to evidence

May Term,
1852.

THOMAS
v.
REISTER.

Saturday,
May 29.

without stating the grounds. *Held*, that the objections could not be noticed on error.

ERROR to the *Ohio* Circuit Court.

PERKINS, J.—*Augustus Igoe* brought an action of debt against *James Thomas*, declaring that said *Thomas*, on the 10th day of *June*, 1835, at *Baltimore*, &c., to-wit, at, &c., made his promissory note to *Nancy* and *Ruth Sampson*, promising to pay them 200 dollars, one day after date; that, afterwards, on, &c., said *Nancy* died, leaving said *Ruth* surviving, and that, subsequently to the death of said *Nancy*, on, &c., at the county of *Baltimore*, state of *Maryland*, said *Ruth* departed this life; that, afterwards, on the 30th day of *September*, 1839, *Jeremiah Ducker* was, by the Orphans' Court in said county of *Baltimore*, appointed administrator on said *Ruth's* estate; that said administrator afterwards, on the 27th of *May*, 1847, indorsed said note to the plaintiff, &c., and that it was not paid, &c. *Igoe* died pending the suit, and *James M. Reister*, his administrator, became a party to and prosecuted it. The defendant, *Thomas*, appeared and pleaded: 1. The general issue; 2. That *Ruth Sampson* did not survive *Nancy*; and 3. That *Ducker* was not appointed administrator upon *Ruth's* estate. He also pleaded three additional pleas, each, in substance, alleging that *Ducker* had ceased to be administrator at the time of the assignment of the note in suit. These pleas last mentioned were not sworn to and were rejected on motion. Issues of fact were formed upon the other pleas, were submitted to the Court for trial, and a judgment was rendered for the plaintiff.

The evidence is upon the record. The plaintiff introduced a note and assignment corresponding with those alleged in the declaration. He proved that *Ruth* was the survivor in life of *Nancy Sampson*, and he gave in evidence the following certificates:

The state of *Maryland*, *Baltimore* county, to-wit: The subscriber, register of wills for *Baltimore* county, doth hereby certify that it appears by the records in his office, that letters of administration of all the goods, chattels,

credits, and personal estate of *Ruth Sampson*, deceased, were, on the 30th day of *September*, in the year of our Lord one thousand eight hundred and thirty-nine, granted and committed unto *Jeremiah Ducker*, who was then and there appointed administrator of the said deceased.

May Term,
1852.

THOMAS
v.
REGISTER.

"In testimony whereof I hereunto subscribe, my name and affix the seal of my office, this 6th day of *July*, in the year of our Lord eighteen hundred and forty-seven. [Seal]. Test: *D. M. Perine*, register of wills for *Baltimore* county.

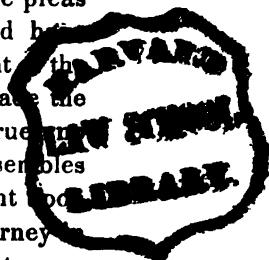
"*Maryland*, act.: I, *Edward D. Kemp*, presiding justice of the Orphans' Court for *Baltimore* county, in the state aforesaid, do certify that the foregoing attestation of *Daniel M. Perine*, register of wills for said county, is in due form and by the proper officer. Given under my hand, at the city of *Baltimore*, this 6th day of *July*, in the year of our Lord one thousand eight hundred and forty-seven. *E. D. Kemp*."

To the introduction of all of which evidence, being all that was offered on the trial, the defendant objected generally, but the Court overruled the objection.

The plaintiff in error contends:

1. That the administrator did not possess the power, by virtue of his office, to assign the note in question. He is wrong in this. On the death of the holder of the legal title to a note or bill of exchange, the right of transfer vests in his executor or administrator. Chitty on Bills, 225.

2. He insists that the Court erred in sustaining the motion to set aside the pleas alleging the cessation of the power, if it once existed, of the administrator to assign the note. In this we think he is mistaken. Those pleas were special pleas of non-assignment and should have been verified by oath. They alleged that the right of the administrator to assign had ceased before he made the supposed assignment. If the allegation was true, no legal assignment had been made. The case resembles *Allen v. Thaxter*, 1 Blackf. 399. That was covenant not a deed averred to have been executed by an attorney in fact. Plea, that the attorney was not authorized to exe-



May Term,
1852.

THOMAS
v.
REGISTER.

cute the deed. It was held that this amounted to a plea of *non est factum*, and was bad for want of an affidavit of its truth. See, also, *Hagar v. Mounts*, 3 id. 57. But, if we are wrong in the above view, if those pleas were not pleas of non-assignment, that is, if the matter of defense set up by them was not necessarily brought forward by a plea, in effect, of non-assignment, then the matter was admissible and should have been offered under the general issue in disproof of the title of the plaintiff to, and right to sue on, said note; and hence, the plaintiff in error need not have been injured by the disposition made of said pleas, and cannot now complain of it (1).

3. It is urged that the Court should not have admitted in evidence the certificate of the register of wills of Baltimore county, Maryland, to the fact that *Ducker* was appointed administrator. We think that paper informal. Properly, the register should have copied the record-entry of *Ducker's* appointment and certified it as a true copy. But we regard the paper as admitted in evidence without objection. This Court has repeatedly decided that a general objection to evidence, such as that made in this case, would not be noticed. *Galbreath v. Doe*, 8 Blackf. 366. That was the rule of practice when this cause was tried in the Circuit Court, and, we doubt not, it presents an instance where right is promoted by its application.

Per Curiam.—The judgment is affirmed, with 1 per cent. damages and costs.

D. Kelso and A. C. Downey, for the plaintiff.

J. W. Spencer, for the defendant.

(1) See *Carter v. Thomas*, ante, p. 213, and note; *Cheek et al. v. Glas*, ante, p. 286; and *Jones et al. v. Ransom*, ante, p. 327.

TEMPLIN v. KRAHN.

May Term,
1852.TEMPLIN
v.
KRAHN.

A promissory note was made payable to A., his agent or attorney. *Held*, that while unnegotiated, suit could only be brought upon the note in the name of A.

A promissory note, which had not been negotiated, was lost, and nothing had been heard of its existence, although four years had elapsed from the time when it became due. At the end of the four years, suit was brought upon it—the declaration alleging the loss, &c. *Held*, that the suit would lie.

In debt by the payee to recover the amount of a lost note, the plaintiff proved by a witness that a note of the maker dated on or about the date of the note described in the declaration, and otherwise corresponding with it, had been left with him to collect the interest; that he had made diligent search for the note and could not find it; and that neither the payee nor any other person ever got the note, to his knowledge, out of his possession. *Held*, that the evidence was sufficient to authorize a judgment for the plaintiff.

The omission of a similitur to the general issue is immaterial after verdict.

ERROR to the *Delaware* Circuit Court.

Saturday,
May 29.

PERKINS, J.—Debt by *Krahn v. Templin*. The declaration alleges that *Templin*, on the 26th of *February*, 1844, made his promissory note in writing, whereby he promised to pay to *Krahn*, or his agent or attorney, in *Albany*, three years from date, the sum of 75 dollars, with interest, payable annually; conditioned that the maker might pay said note 90 days before maturity, in good notes or due-bills then due on men in *Delaware* county. The note is alleged to be lost, but due and unpaid. The declaration was filed in 1851.

Plea, the general issue. Trial by the Court.

The evidence given upon the hearing was the deposition of *Uriah Pace*, which reads as follows: "I, *Uriah Pace*, am knowing that *Josiah Templin* executed, on or about the 26th day of *February*, 1844, one note of hand to *William J. F. R. Krahn*, whereby he promised to pay said *Krahn* 75 dollars, three years after date, interest payable yearly. Said note was made payable to said *Krahn*, his agent or attorney, in *Albany*. Said note was conditioned that said defendant might pay the same 90 days before maturity, in good notes or due-bills then due

May Term,
1852.

TEMPLIN
v.
KRAHN.

upon good men in *Delaware* county; and said *Templin* delivered said note, signed by said defendant, to the plaintiff, which said note was lost or mislaid, when in my possession as acting justice of the peace of said county, being delivered to me by the plaintiff for collection of interest in the year 1845. I have made diligent search for said note and cannot find it; and neither *Krahn* nor any other person ever got the note out of my possession to my knowledge. The property or land for which said note was given once belonged to me, to-wit, a lot in the town of *Albany*, in *Delaware* county, and was sold and conveyed by me either to *Krahn* or one *John Bane*, not certain which."

Upon this evidence the Court found for the plaintiff, and afterwards refused a new trial.

The first question presented is, whether this suit at law can be sustained?

The note, which is made the foundation of the action, was not payable to bearer. It contained a promise by the maker to *Krahn* to pay to him or his agent or attorney. For a breach of that promise *Krahn* alone could sue, while the note remained unnegotiated. *Harper v. Ragan*, 2 Blackf. 39. It had not been negotiated, and some four years had elapsed after it became due before this suit was instituted, and still nothing heard of its being in existence. All this sufficiently shows that the defendant is in no danger of being hereafter called upon to pay the note to a *bona fide* holder. There is no doubt, therefore, but that this suit at law will lie for its collection, though lost. *Dean v. Speakman*, 7 Blackf. 317.

The next point made is, that the evidence did not authorize the finding of the Court. We think it did. The plaintiff was bound to establish the existence and loss of such a note as that described in the declaration. According to the decisions in *Connecticut*, he was bound to establish both these facts by legal evidence, independent of his own oath. In that state it is held, that the general issue, pleaded to a declaration on a lost note, puts in issue the fact of loss, as well as other facts in

the cause, and makes it a jury question. *Coleman v. Walcott*, 4 Day, 388.—*Swift v. Stevens*, 3 Conn. (2 series), 431. In this state, however, it is decided that the fact of loss is, in the first instance, a question for the Court, and may be proved by the oath of the party. *Bean v. Keen*, 7 Blackf. 152. But in the case before us, this, as well as the other facts, was shown by disinterested evidence, and we think sufficiently. The existence, loss, and contents of the note were all proved. It is objected that the evidence did not make out the identity of the note mentioned in it with that sued on. It is said the plaintiff below may have had two notes of a like description. True, but the judgment in the present case will merge one of said notes, and will be pleadable in bar of any other suit on a note of a like description, and thus raise the question in such suit as to the existence of more notes than one.

The next and last point made is, that the *similiter* was not added to the plea of the general issue. This is an immaterial point. The issue was substantially formed without the *similiter*. *Jared v. Goodtule*, 1 Blackf. 29.

Per Curiam.—The judgment is affirmed with costs.

J. S. Buckles, for the plaintiff.

W. March, for the defendant.

May Term
1852.

BILLINGSLEY
v.
STATE BANK
OF INDIANA.

BILLINGSLEY v. THE STATE BANK OF INDIANA.

The statute which enacts that no holder of a bill of exchange shall be permitted, at any term of the Circuit Court, to institute more than one suit upon such bill, prohibits the institution of separate suits on such bill at the same term, but not at different terms, of the Court.

It is not material on error whether a deposition read by the plaintiff at the trial should have been suppressed or not, if the evidence was simply sufficient without it to sustain the suit.

The protest of a bill was written and signed on the day that payment was refused, but the notary did not affix his seal until several months afterwards, but before the trial of the suit against the indorser. *Held*, that the protest was completed in time.

May Term,
1852.

BILLINGSLEY
v.
STATE BANK
OF INDIANA.

A. being indebted to the plaintiff in a certain sum, the latter, in order to obtain payment, purchased of him, at a fair price, a bill drawn payable at a bank in *New Orleans*, and applied the proceeds, with his consent, to such payment, having reason to believe when the bill was bought that it would be paid at *New Orleans* when it should become due. *Held*, that the transaction was not a loan, but a fair purchase of a bill of exchange.

Where a verdict against a party would still have been right, although evidence offered by him and rejected had been admitted, he cannot complain of the rejection of the evidence.

The statute of 1843, which declares usurious contracts valid as to the principal debt, applies as well to loans made by the state bank as to those made by individuals.

A verdict will not be set aside on error on account of erroneous instructions given to the jury, if it is apparent from the evidence that the verdict, notwithstanding, was right.

Saturday,
May 29.

ERROR to the *Dearborn* Circuit Court.

BLACKFORD, J.—In *March*, 1850, *The State Bank of Indiana*, as indorsee of a bill of exchange for 2,000 dollars, brought an action of assumpsit against *John Billingsley*, as indorser. The declaration, which was filed at the *April* term, 1850, alleges that the bill was drawn at *Lawrenceburgh*, in this state, on the 1st of *February*, 1849, by one *Davis W. Cheek* on one *Henry Raymond*, *New Orleans*; that it was payable, four months after date, to the order of one *William V. Cheek*, at the *Mechanics' and Traders' Bank*, in *New Orleans*, and was indorsed by the payee, the defendant, and others. The declaration also alleges the due presentment of the bill, its non-payment and protest, and a due notice of the dishonor to the defendant.

There was a plea in abatement as follows: That therefore, to-wit, at the *October* term, 1849, of the *Dearborn* Circuit Court, the plaintiff had sued one *Jacob Hays* as indorser of the same bill of exchange, in which suit the said *Hays* had obtained judgment; that the plaintiff had appealed from that judgment to the Supreme Court, where the suit was then pending.

That plea was demurred to and the demurrer sustained.

The defendant then pleaded the general issue. He

also moved the Court to suppress the deposition of one *H. B. Cenas*, but the motion was overruled. The cause was afterwards tried, and a verdict and judgment rendered for the plaintiff.

The first objection made to the judgment is, that the demurrer to the plea in abatement should have been overruled.

It is not contended but that, by the law-merchant, the holder of a bill may proceed at the same time, in separate suits, against each of the parties who may be liable, until the debt is satisfied; but the defendant supposes that this rule of the law-merchant is so changed by our statute as to authorize his plea in abatement. The statute enacts that no holder of a bill of exchange shall be permitted, *at any term of the Circuit Court*, to institute more than one suit upon any one such bill. R. S., p. 697. We think it is plain that this provision does not apply to the present case. The statute prohibits the institution of separate suits on a bill of exchange *at the same term of the Court*. But the plea before us does not allege that the suit against *Hays* was commenced at the same term with the suit against *Billingsley*. On the contrary, the plea shows that the suits were commenced at different terms—the suit against *Hays* at the *October* term, 1849, and that against *Billingsley* at the *April* term, 1850. The demurrer, therefore, was rightly sustained.

The next objection is, that the deposition of *Cenas* should have been suppressed.

Cenas was the notary who protested the bill of exchange. His deposition tends to show the dishonor of the bill, the certificate and notarial seal attached to the protest to be genuine, and the notices of the dishonor to have been regularly given to the drawer and indorsers.

It is not material whether this deposition should have been suppressed or not, as the evidence was amply sufficient without it to sustain the suit.

The plaintiff gave in evidence the bill of exchange, the indorsements thereon, and the protest, as described in the

May Term,
1852.

BILLINGSLEY
V.
STATE BANK
OF INDIANA.

May Term,
1852.

BILLINGSLEY
v.
STATE BANK
OF INDIANA.

declaration. The defendant objected to the protest, on the ground that the notarial seal was not affixed to it until several months after the protest had been signed; but the objection was correctly overruled. The law appears to be settled that though the bill ought to be noted for non-payment on the day of the refusal to pay, still the protest may be drawn up at any time before the trial, and antedated accordingly. Byles on Bills, 190.—Chitty on Bills, 527-'8. In the case before us, the protest was written and signed on the day the payment was refused, and the notarial seal was affixed to the protest by the notary previously to the trial. It is clear, therefore, that the objection to the protest, that it was not completed in time, was without foundation. The case of *Bailey v. Dozier*, 6 Howard's Sup. Court U. S. Rep. 23, cited by the plaintiff, sustains this decision. It was also proved that the plaintiff gave due notice to the defendant of the dishonor of the bill. There was proof also that the plaintiff gave for the bill the full amount for which it was drawn, less the legal interest for the time the bill had to run, and one *per cent.* as the rate of exchange, which was admitted to be the customary rate on such bills.

This was the plaintiff's evidence; and it showed, *prima facie*, that he was entitled to recover.

The defense relied on was, that the transaction was, under the appearance of a purchase of a bill of exchange, a mere loan of money; and that the loan, on account of the one *per cent.* taken as exchange, was usurious and void.

The facts, as to this part of the case, appear to be, that *William V. Cheek*, the payee of the bill, had become liable to the plaintiff for a certain sum of money; that the plaintiff, in order to obtain payment of that debt, purchased the bill of said *William V. Cheek*, at a fair price, and applied the proceeds, with his consent, to such payment; and that the plaintiff, when the bill was purchased, had good reason to believe that the bill would be paid at *New Orleans* when it should fall due.

It appears to us, therefore, that the transaction in question was not a loan, but a fair purchase of a bill of exchange.

May Term,
1852.

WITHROW
v.
WILEY.

In the course of the trial, the defendant offered to prove the rate at which the plaintiff, when said bill was bought, was selling bills on *New Orleans* payable at sight; and also to prove that, at the same time, the plaintiff knew that the drawee, *Raymond*, lived in this state, and was not likely to have funds in *New Orleans*. This evidence was held not to be admissible. We need only remark, with regard to this evidence, that, had it been admitted, the verdict would still have been clearly right.

The Circuit Court held, in this case, that if the bank make a usurious loan to any one, the whole contract is void. We are of opinion, however, that the statute of 1843, which declares usurious contracts valid as to the principal debt, applies as well to loans made by the bank as to those made by individuals. R. S. 1843, p. 581.

The defendant objects to some instructions given to the jury. But as we have no doubt, from the evidence, but that the verdict is right, the instructions cannot affect the case.

Per Curiam.—The judgment is affirmed, with 6 per cent. damages and costs.

A. Brower, for the plaintiff.

P. L. Spooner, for the defendant.

WITHROW and Another v. WILEY.

To a suit by the payee against *A.* and *B.*, the makers, upon a promissory note payable at a day specified, the defendant pleaded the following pleas in bar: 1. A parol contract, entered into between the parties, when the note was made, by which the plaintiff was never to sue on the note; 2. That, after the execution of the note by *A.*, to-wit, &c., a parol agreement was made by the parties that if *B.* would sign the note as surety, the plaintiff would never sue on the note, but would receive the interest thereon, unless *A.* should deny the note and not try to pay the same. Averment, that the interest had been paid, and that *A.* had never denied the note. General demurrer to both

May Term,
1852.

WITHROW
v.
WILEY.

pleas. *Held*, that the first plea was insufficient. *Held*, also, that supposing that the second plea had also showed that *B.* at the time of said parol agreement, or afterwards and in pursuance of it, had executed the note, still it would have been insufficient. *Held*, also, that if said second plea did not show that *B.* executed the note in pursuance of the parol agreement, the plea was bad for not showing that the condition had been performed, upon the performance of which the promise not to sue was made.

In a declaration upon a note, the day on which the note is alleged to have been executed is not traversable.

Saturday,
May 29.

ERROR to the *Decatur* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *Wiley* against *Adoniram J. Withrow* and *Augustus Garrison*. Judgment for the plaintiff. The suit was founded on a promissory note which the declaration alleged had been executed by the defendants on the 4th of *September*, 1849. The note is as follows:

"*September 4, 1849.* Four months after date, we promise to pay *John H. Wiley* or order, for value received, the sum of 228 dollars and 45 cents, without any relief whatever from valuation or appraisement laws. *A. J. Withrow, Augustus Garrison.*"

The defendants pleaded four pleas in bar.

1. *Nil debet.*

2. That the note was given by *Withrow* as principal and *Garrison* as surety, for a lot of stock for harness-making before that time sold and delivered to *Withrow* by the plaintiff; that, at the time of the sale and delivery of said stock, it was the agreement between the plaintiff and *Withrow*, that *Withrow* should not be bound to pay for said stock, or any part thereof, until he should work it up and make the money out of the same; that, after the sale and delivery of said stock, the plaintiff, falsely and fraudulently, and to induce the defendants to give said note, agreed with the defendants, that if they would give said note so as the same would draw interest from the end of four months, the plaintiff never would bring suit on said note. Averment, that the defendants confiding in said promises, and being misled by the same, did, contrary to said contract made for said stock, execute

said note; and that *Withrow* has not, as yet, worked up said stock, nor made the money out of the same. Veri-

May Term,
1852.

WITHROW
v.
WILEY.

fication.

There was a general demurrer to this second plea, and the demurrer was sustained.

This second plea is insufficient. The note sued on is, on its face, for the payment, absolutely, of a certain sum of money on a certain day. The plea sets up a parol contract between the parties, entered into at the time the note was given, by which contract the plaintiff was never to sue on the note. Here, the note, according to its face, could be sued on at the end of four months from its date; but according to the contemporaneous parol agreement, the note could never be sued on. The parol agreement pleaded contradicts the face of the note, and is, for that reason alone, no defense to the suit. There is the following case: Assumpsit on a promissory note payable on demand according to its face. The defendant offered to prove by parol that the note was not payable on demand, but that it was to be paid only on a future and contingent event. The evidence was objected to, and the objection sustained on the ground that the parol evidence would destroy the written contract, and substitute a different one in its place. *Graves v. Clark*, 6 Blackf. 183. That case shows the plea before us to be bad.

The third plea is similar to the second. It was also demurred to, and the demurrer was correctly sustained.

The fourth plea states, that after the execution of the note by *Withrow*, the plaintiff and defendants agreed, on the 25th of *September*, 1849, that if *Garrison* would sign said note as surety, the plaintiff would never sue on the note, but would receive the interest thereon, unless *Withrow* should deny the note and not try to pay the same. Averment, that the interest had been paid, and that *Withrow* had never denied the note.

General demurrer to this fourth plea, and the demurrer sustained.

The declaration alleges that both defendants executed the note on the 4th of *September*, 1849. The fourth

May Term,
1852.

WITHROW
v.
WILEY.

plea admits that allegation as to *Withrow*; but it impliedly denies that *Garrison* executed the note at that time. The plea also states, that afterwards, to-wit, on the 25th of *September*, 1849, the parol agreement mentioned in the plea was made, namely, that if *Garrison* would sign the note as surety, the plaintiff would never sue on the note, but would receive the interest thereon, unless *Withrow* should deny the note. We will suppose that the plea also shows that *Garrison*, at the time of said parol agreement, or afterwards, and in pursuance of it, executed the note.

According to the plea so understood (and the defendants can ask nothing more for it), the note, after *Garrison* signed it, was no longer the separate note of *Withrow*, but became a new and joint note of *Withrow* and *Garrison*, dated on the 4th of *September*, 1849, but executed on the 25th of *September*, 1849. The plaintiff's parol agreement never to sue, therefore, was entered into at the same time with, or at some time before, the execution of the note by the defendants. The consequence is, that the face of the note, which is for the payment of money at a certain time, is not to be controlled by the parol contract contradicting the note, and relied on in the plea.

If the plea does not show that *Garrison* executed the note in pursuance of the parol agreement, the plea is bad for not showing that the condition had been performed upon the performance of which the promise not to sue was made.

It cannot be said that the plea, supposing it impliedly to deny that the note was executed on the 4th of *September*, 1849, is a defense; the allegation in the declaration, that the note was executed on that day not being traversable. 1 Phill. Ev. 514.

Per Curiam.—The judgment is affirmed, with 3 per cent. damages and costs.

J. Robinson, for the plaintiffs.

J. S. Scobey, for the defendant.

EDGERTON, Administrator of Lotz v. COMSTOCK.

May Term,
1852.

EDGERTON
v.
COMSTOCK.

Bill by the administrator of *L.* against *C.* to restrain the collection of a judgment at law and for a decree for a new trial of the issues. The bill alleged that the suit at law was assumpsit for work and labor, commenced by *C.* against *L.* in his lifetime, and that *C.* obtained judgment, &c.; that at the trial the Court improperly refused to admit certain evidence offered by *L.* to prove the value of the work; that *C.* was permitted to give evidence which ought to have been rejected; that the jury disregarded certain evidence of payment offered by *L.* and rendered judgment for *C.* though nothing was due him; and that the Court refused a new trial. It was also alleged that bills of exception were taken to all these proceedings, and upon an appeal to the Supreme Court, the judgment was affirmed. *Held*, that a demurrer to the bill was correctly sustained.

ERROR to the *Allen* Circuit Court.

Monday,
May 31.

SMITH, J.—This was a bill in chancery praying for an injunction to restrain the collection of a judgment at law, and for a decree to order a new trial of the issues joined by the parties.

The bill alleges that the suit at law was an action of assumpsit for work and labor, commenced by *Comstock* against *Lotz* in his lifetime, and that the former obtained a judgment for 600 dollars.

It is charged that on the trial the Court improperly refused to permit certain evidence offered by *Lotz* to prove the value of the work sued for, to be given to the jury for that purpose; that *Comstock* was permitted to give evidence which should have been rejected; that the jury disregarded certain evidence of payment offered by *Lotz*, and rendered the judgment in favor of *Comstock*, though nothing was due him; and that the Court refused a new trial.

It is also alleged that bills of exception were taken to all these proceedings, and an appeal granted to this Court, where the judgment was affirmed.

A demurrer to the bill was correctly sustained. No grounds whatever are shown for relief in equity.

Per Curiam.—The decree is affirmed with costs.

H. Cooper, for the plaintiffs.

D. H. Colerick, for the defendant.

May Term,
1852.

STOCKWELL

v.

WALKER.

STOCKWELL and Another v. WALKER and Others.

Where land is about to be sold upon execution on a judgment which has ceased by lapse of time to be a lien thereon, the proper proceeding to prevent the sale is by motion on the law side of the Court to have the levy set aside.

Monday,
May 31.

APPEAL from the *Tippecanoe* Circuit Court.

SMITH, J.—Bill of complaint filed by the appellants on the 21st of *February*, 1850. The facts stated by the bill are as follows:

On the 22d of *August*, 1839, one *Keirle*, who is since deceased, recovered a judgment against *David Patton* for 886 dollars and 86 cents, and on the 18th of *November*, 1839, *Elias L. Beard* entered himself replevin-bail for its payment. In *March*, 1845, *John Walker*, as administrator of *Keirle*, obtained a judgment of revivor against *Patton* alone, without impleading *Beard*. Afterwards, the said administrator sued out a *scire facias* upon said judgment against *Patton* and *Beard* jointly, and in *October*, 1849, obtained a judgment of revivor against them both. No defense was made to either of these proceedings by *scire facias*, but the judgments of revivor were obtained with the consent of *Patton* and *Beard*. An execution was issued on the last-named judgment of revivor, and was levied on lot No. 52, in the town of *Lafayette*, as the property of *Beard*.

On the 20th of *September*, 1844, *Beard* mortgaged the lot above named to one *Steinberger* to secure the payment of 10,000 dollars. On the 9th of *October*, 1844, *Beard* made a second mortgage of the same property to *Steinberger* to secure a further debt of 5,000 dollars. This last mortgage also embraced another lot in the same town.

On the 8th of *November*, 1845, certain persons, assignees of *Steinberger*, filed a bill to foreclose said mortgages. A decree of foreclosure was rendered in *November*, 1847, and on the 15th of *April*, 1848, the appellants became the purchasers of all the property so mortgaged for the sum

of 5,500 dollars, at a sheriff's sale made pursuant to the decree. May Term,
1852.

The present bill is filed against *Walker* as administrator of *Keirle, Patton, Beard*, and the sheriff, and prays for a decree to restrain the defendants from proceeding to sell said property under the execution upon the judgment of revivor, and to free the property from all incumbrances arising from said judgments.

HOUCK
v.
DEITZ.

The defendants filed a demurrer, which the Court sustained, and the bill was dismissed.

We think the demurrer was correctly sustained, because the bill presents no ground for chancery jurisdiction. If the lapse of time had removed the lien of the judgments, and that is the only ground upon which relief could be afforded, the proper proceeding was a motion on the law side of the Court, to have the levy set aside, if a sale under it would prejudice the complainants. *Lasselle v. Moore*, 1 Blackf. 226.

Per Curiam.—The decree is affirmed, with costs.

J. Pettit and *S. A. Huff*, for the appellants.

D. Mace and *R. C. Gregory*, for the appellees.

HOUCK v. DEITZ.

A judgment rendered on a new trial will not be reversed because the new trial was granted upon insufficient grounds, if the adverse party has admitted before the Court below the truth of a material part of the evidence to admit which the new trial was granted.

The fact that such admission was made to prevent a continuance, makes no difference.

Where the evidence given at the trial is not in the record, it will be presumed that the judgment was in accordance with it.

ERROR to the *Ripley* Circuit Court.

Monday,
May 31.

SMITH, J.—This was an action of assumpsit commenced before a justice of the peace, and taken to the Circuit Court by appeal. The cause of action was a bill of goods

May Term,
1852.

HOVOK
v.
DIXON.

sold by the plaintiff to the defendant, consisting of several items, and amounting, in the whole, to 98 dollars and 39 cents. There were two trials in the Circuit Court, the first of which resulted in a judgment for the plaintiff for the whole amount of his bill of particulars.

A new trial was granted upon an affidavit of the defendant, stating, in substance, that the cause was tried in his absence, late at night; that the plaintiff was made a witness in the cause, and the said plaintiff testified that the amount of said bill was due and owing to him, and denied positively that any part of said bill had ever been paid or settled; that since the trial the defendant had been informed and believed that he could prove that 28 dollars and some cents' worth of the goods so sold and charged to the defendant, was taken back by the plaintiff, for which the defendant should have had a credit; and that he did not expect the return of said goods would have been denied by the plaintiff, and expected to be able to prove the return of said goods if a new trial was granted.

At a subsequent term, after a new trial had been granted, the cause being again called, the defendant applied for a continuance upon an affidavit stating that certain persons were material witnesses for him, and that he expected to be able to prove by one or both of them the return to the plaintiff of a part of the goods charged to the defendant in the cause of action. The Court being of opinion that the affidavit was sufficient, the plaintiff, to prevent a continuance, admitted that the matters contained in the affidavit should be taken as true; and the cause being thereupon again submitted, the plaintiff obtained a judgment for 70 dollars damages and his costs.

The plaintiff below now prosecutes this writ of error and contends that the last judgment should be set aside and the first reinstated, because the new trial was granted upon insufficient grounds.

But, as the plaintiff entered into the second trial, and admitted that a part of the goods for which the action

was brought had been returned to him, so that by his own admission the first judgment was wrong, we think the last judgment ought not now to be disturbed. The fact that the admission was made to prevent a continuance of the cause, can make no difference. It is not to be supposed he would make such an admission, if the fact was untrue, even for such a purpose.

As the evidence given at the last trial is not in the record, it must be presumed the judgment was in accordance with it, and that the plaintiff recovered all that he was justly entitled to.

Per Curiam.—The judgment is affirmed with costs.

E. Dumont, for the plaintiff.

May Term,
1852.

CONWELL
v.
THE STATE.

CONWELL and Others v. THE STATE.

A person who owns the reversion or remainder in land, if there is a suit pending between him and another involving a question of waste or improvements, has a right to go upon the premises in a peaceable manner with witnesses, for the purpose of examining the same.

ERROR to the *Franklin* Circuit Court.

Monday,
May 31.

SMITH, J.—This was an indictment for riot. The indictment charges that on, &c., at, &c., *Conwell* and five others did unlawfully, riotously, &c., assemble together to disturb the peace, and did make a great noise, riot, &c., and did riotously, &c., strike, beat, &c., one *Smith*, in the peace of the state, &c. The defendants pleaded not guilty. *Conwell*, and two of the other defendants were found guilty and fined, and three of the defendants were acquitted.

The record does not contain the evidence, but a bill of exceptions states that the defendants requested the Court to charge the jury that “if *Conwell* owned a part of the reversion or remainder of the land in dispute, and there was a suit pending between himself and *Hedrick* involv-

May Term,
1852.

MALABY
v.
KUNS.

ing a question of waste or improvements, *Conwell* was authorized to go upon the premises in a peaceable manner, with his witnesses, for the purpose of examining the same," and that "there was evidence in the case authorizing said charge;" but the Court refused to give it.

Not having the evidence before us, we cannot estimate what effect this instruction would have had upon the result of the trial, but we can see no objection to it as an abstract principle of law, and, from all that appears, we think it should have been given.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

G. Holland and *J. D. Howland*, for the plaintiffs.

D. D. Jones and *J. Ryman*, for the state.

MALABY and Wife v. KUNS.

Where notes are given to secure the purchase-money of land, payable respectively on or before a given day, under a contract that a deed is to be executed for the land on the payment of the notes, a suit cannot be maintained on either of the notes after the last has become due, unless a deed was tendered on or before the day when the last note matured.

Monday,
May 31.

ERROR to the *Carroll* Circuit Court.

SMITH, J.—This was an action of debt brought by the plaintiffs in error upon two promissory notes for 500 dollars each, one payable on the first day of *January*, 1848, and one on the first day of *January*, 1849.

The defendant pleaded, *inter alia*, that these notes, with two others, due in 1846 and 1847, and which had been paid, were given in consideration of an agreement by the plaintiffs to execute to him a deed for a certain tract of land on the payment of said four notes; and that the plaintiffs did not, on the *first day of January*, 1849, which was the day on which the last note became due, or at any time previous to said day (1), make, or offer to make, such

deed, on condition of the defendant's paying the balance of the purchase-money, or otherwise howsoever.

The plaintiffs demurred to this plea, but the demurrer was overruled, and the defendant had judgment.

May Term,
1852.
PARDUN
v.
DOBESBERGER.

The plaintiffs contend that they were not bound to tender a deed on the day the last note became payable, but that, as it was to be made *on the payment of all the notes*, if such payment was not made on that day, they could at a subsequent day, within a reasonable time, tender a deed and sue on the notes.

The plea must, however, be held good under the former decisions of this Court. The same point was made in the case of *McCulloch et al. v. Dawson*, Ind. R. 245, (2) in which the principles involved are discussed at length.

Per Curiam.—The judgment is affirmed with costs.

G. S. Orth and E. H. Brackett, for the plaintiffs.

D. D. Pratt and H. Allen, for the defendant.

(1) The record shows that said last note was payable *on or before* the 1st day of *January*, 1849.

(2) See 1 Carter's Ind. R. 413.

PARDUN and Another v. DOBESBERGER.

Bill of foreclosure against a mortgagor and subsequent mortgagee. Defendants defaulted. Decree that the mortgagor should, within, &c., pay the sum due on the complainant's mortgage, and that in default thereof the premises should be sold, the costs and the amount of the complainant's mortgage paid, and the residue of the proceeds of the sale brought into Court to await its further order. *Held*, that the defendants could not complain that the sum due to the subsequent mortgagee was not ascertained and directed to be paid out of the overplus left after the payment of the complainant's mortgage and costs.

A certificate of acknowledgment to a mortgage after certifying that the husband and wife had voluntarily executed the deed, was as follows: "The said wife having been by me examined separate and apart from her said husband, and the contents of the above deed being read and explained to her *as the law directs*, acknowledged the same to be her voluntary act and deed, without force or coercion from her said husband." *Held*, that the certificate showed a legal acknowledgment under the R. S. 1843.

May Term,
1852.

PARDUN
v.
DOBESBERGER.

Monday,
May 31.

ERROR to the *Dearborn* Circuit Court.

PERKINS, J.—Bill in chancery to foreclose a mortgage.

The bill was brought by *Matis Dobesberger*, a mortgagee, against *Walter Pardun* and wife, mortgagors, and *Franklin Staker*, a subsequent mortgagee. The note and mortgage to the plaintiff in the bill were made exhibits. The defendants made default, and there was a decree that *Pardun* should pay the amount due from him upon the mortgage to *Dobesberger* within six months, or that, in default of such payment, the property mortgaged should be sold, the costs of the suit and the amount of *Dobesberger's* mortgage paid, and the overplus of the sale-money, if any, brought into Court to await its further order.

This decree is complained of because it does not ascertain the amount due to *Staker* on his mortgage and direct its payment out of any overplus-money there might be at the sale ordered.

It was proper, though perhaps not necessary, that *Staker*, as a subsequent incumbrancer, should be made a party to this suit. See *Story's Eq. Pl.* s. 193, and note 2 on page 239. He would thus be enabled to come in at the hearing, establish any claim he might have, and ask a decree for its payment out of any money there might be after paying prior incumbrances on which the mortgaged property might be sold. But should he not so come in, it would not be the duty of the first mortgagee plaintiff, to establish the claim of the second mortgagee defendant. It would suffice for the plaintiff to establish his own. And neither *Staker* nor the other defendants in this case can complain that a decree was not rendered which was not asked for nor shown to be due by proofs. Nor has *Staker* been injured by the failure to render such a decree; and for this reason he could not obtain a reversal of the decree that was made in the case. On the return of the overplus-money from the sale to the Court by the sheriff, *Staker* can still come in, on notice to the proper parties, and claim the application of it in liquidation of his mortgage.

It is also contended that the decree barring the right

of *Pardun's* wife in the mortgaged premises is erroneous, because the mortgage was not legally acknowledged. The certificate of acknowledgment is in the following form :

May Term,
1852.

PARDUN
v.
DOERNBERGER.

"State of *Indiana*, *Dearborn* county, sct.: Before me, *William Tibbetts*, a justice of the peace within and for said county, personally came *Walter Pardun* and *Dinah Pardun*, the foregoing grantors, and acknowledged the above indenture to be their voluntary act and deed for the uses and purposes therein contained—the said wife having been by me examined separate and apart from her said husband, and the contents of the above deed being read and explained unto her as the law directs, acknowledged the same to be her voluntary act and deed without force or coercion from her said husband. In testimony," &c.

The R. S. of 1843, which we presume to have been in force in *Dearborn* county at the time this acknowledgment was taken, requires that the wife, in acknowledging a deed, shall be examined relative thereto, separate and apart from, and without the hearing of, her husband, and that the officer taking the acknowledgment shall certify the examination to have been so made. P. 421. The certificate in this case will, or will not, be evidence of a legal acknowledgment, according to the construction that shall be given to section 42, p. 421 of said R. S. If a liberal construction be given—if a substantial compliance only with it, in regard to the certificate of acknowledgment, be required—the certificate may be held sufficient evidence. If a strict construction be adopted, and a literal compliance be required, this certificate cannot be held evidence that a legal acknowledgment was taken. We think the ends of justice will be best subserved by adopting a liberal construction and requiring but a substantial compliance, and accordingly hold the certificate sufficient. The law requires that the examination of the wife shall be apart from and without the hearing of the husband—that is, so far apart from him that he cannot hear it; and the officer certifies in this case, as we understand him, that the exa-

May Term,
1852.

POWELL
v.
NORTH.

mination, &c., was apart from the husband "as the law directs," and we presume in favor of the officer's having discharged his duty legally (1).

Per Curiam.—The decree is affirmed with 1 *per cent.* damages and costs.

J. T. Brown, for the plaintiffs.

T. Gazlay, for the defendant.

(1) See *Butterfield and Others v. Beall*, ante, p. 203.

3	392
125	115
3	392
151	11

POWELL, Administrator, v. NORTH and Others.

A partnership may, after the death of a partner, be continued by a Court of Equity on behalf of the infant children of the deceased partner, if the surviving partners consent.

The Probate Courts of this state possess general equity powers in relation to the administration and guardianship of estates.

An order of the Probate Court to a guardian to invest money of his wards, without defining the amount, in the completion of an unfinished distillery, according to their interests therein, was held to justify a reasonably prudent expenditure for the purpose.

The money of the wards being in the hands of their father's administrator, the latter, under the direction of the guardian, made expenditures of the money in the completion of the distillery. *Held*, that the administrator was entitled to a credit, upon settlement of the estate, so far as his expenditures were made with reasonable care and judgment.

Monday,
May 31.

ERROR to the Ohio Probate Court.

PERKINS, J.—Bill on the chancery side of the Ohio Probate Court by *William H. Powell*, administrator upon the estate of *Levi North*, deceased, against *Joseph T. North et al.*, complaining, that on the 10th day of *May*, 1845, said *Powell*, and said *North*, deceased, were partners in milling and merchandising, said *Powell* owning one-third, and said *North* two-thirds, of the real and personal property invested, and sharing in said proportions in the profits of the concern; and that, on the day aforesaid, said *Levi North* sold—the plaintiff, *Powell*, it seems, consenting—to one *Thomas J. North*, one-half of his two-

thirds of said entire property, whereby the firm was made to consist of the plaintiff, *Powell, Levi North*, and *Thomas J. North*, each owning one-third of the joint property; that said firm, thus constituted, agreed to erect a distillery, commenced it, and expended 2,400 dollars, being 800 dollars by each member, when, the distillery being unfinished, in *August*, 1845, said *Levi North* departed this life, and the plaintiff, *Powell*, was appointed his administrator, and ordered by the *Ohio* Probate Court to expend, as such, for said *Levi's* estate, the further sum of 533 dollars on said distillery, which was done; that said *Levi North* left heirs, some adult and some infant; that, in *November*, 1845, *James* and *Abijah North*, the guardians of the infant heirs, filed in the *Ohio* Probate Court a petition representing that said *Levi*, living, was one of the firm of *North, Powell, & Co.*, which firm undertook to build and put in operation a distillery and join the same to the steam-mill owned by said company; that, in pursuance of said undertaking, said *Levi* spent, as his proportion, 800 dollars, and died, leaving said distillery unfinished; that, since his death, the surviving partners had expended about 1,200 dollars more, nearly completing the building, and that, unless said heirs finished and owned their third of said establishment, it would be difficult for the petitioners and said *Powell* and *Thomas J. North* to keep correct books between them, as all the grain consumed by said distillery would be ground by said mill; and further stating that the 800 dollars expended in said *Levi's* lifetime would be lost to said heirs unless they completed their portion of said undertaking, as no person would purchase their interest in the distillery separate from their interest in the steam-mill, and that said distillery, situated as it was, connected with a steam-mill that consumed annually about 100,000 bushels of grain, with a full supply of water to run both, without hauling, the year round, would be profitable to the heirs. An order was prayed to expend a sufficient sum to complete the heirs' part of said distillery, together with all other ne-

May Term,
1852.

POWELL
v.
NORTH.

May Term,
1852.

POWELL
v.
NORTH.

cessary buildings and appendages; and it was averred that there was a sufficiency of personal effects for that purpose. The Court made the order accordingly, without limiting the amount to be expended. The distillery was thereupon completed with necessary additional buildings and appendages—so the present bill states—the whole costing about 10,000 dollars, the administrator, *Powell*, making the expenditures on behalf of the heirs, out of money in his hands, with the assent and under the order of said guardians and adult heirs, to the amount of 2,533 dollars. The bill further states that said Probate Court authorized the continuance of the business of the firm, the share of the heirs remaining invested, and that it was continued till the 17th of *September*, 1846, but resulted in a loss, all of which was borne by the plaintiff personally; that, at the death of *Levi North*, a true account of the personal property of said firm was taken, amounting to 1,479 dollars and 51 cents, one-third of which, being 493 dollars and 17 cents, belonging to said heirs of *North*, and at the final closing of said partnership business in *September*, 1846, the personal property of said firm was sold for 4,286 dollars and 91 cents, one-third of which was secured to said heirs, &c.; that, after the winding up of the concern in *September*, 1846, partition was made of the real estate as improved by the expenditure of the money hereinbefore mentioned, said heirs receiving one-third of the property. The plaintiff further alleges that he had been cited to make settlement, as administrator, in said *Ohio* Probate Court; that he had received for the estate of the deceased *North*, 5,077 dollars and 21 cents, and paid out for debts, 1,441 dollars and 34 cents, and the two items of 533 dollars and 2,533 dollars on said distillery, &c.; and had distributed 948 dollars and 86 cents among the heirs. Prayer, that the plaintiff might be credited with said sums in his settlement.

A guardian *ad litem* was appointed for the infants. A part of the defendants made default and a part demurred to the bill. The Court sustained the demurrer, but pro-

ceeded to decree against the administrator that he should pay over the item of 2,533 dollars, alleged to have been expended on the distillery.

May Term,
1852.

POWELL
v.
NORTH.

This proceeding seems to have been treated by the Probate Court as a mixed one, partaking of the character of a bill in chancery and an answer to a citation for a settlement. Whether evidence was produced or not does not appear; but the Court seems to have decided on the demurrer to the bill, that the administrator could not be credited, in his settlement, with said item of 2,533 dollars expended in and about the distillery; and it is manifest from the arguments of counsel that the point of controversy in the cause was upon the right of the administrator to such a credit. That point, therefore, we shall decide, upon the supposition that said sum was so expended.

Death, as a general rule, dissolves a partnership; but a Court of Equity has power to authorize its continuance on behalf of infants. *Thompson v. Brown*, 4 John. Ch. R. 619. Our Probate Courts possess general equity powers in relation to the administration and guardianship of estates. It was within the power of the *Ohio* Probate Court, therefore, to permit, as it is alleged in this case that it did, a continuance of the partnership, and to order the completion of the distillery, &c. That order was a protection to the party in a reasonably prudent expenditure of the requisite sum for that purpose. The order in question was to the guardians of the infants; but the money to be expended was in the hands of the administrator, *Powell*; and, had the guardians required and received it from him, he would have been entitled to a receipt from them which would have been a voucher in his settlement. Instead of calling upon him for the money, they, in connection with the adult heirs, who were competent to consent to the continuance of the partnership and the expenditure of the money in their own behalf, directed said administrator to expend the same, and so far as he did it with reasonable care and judgment, it seems to us, he should receive a credit in his settlement. If the money

May Term,
1852.

CONKLIN
v.
WALTZ.

was not, in fact, laid out by him, of course, he should not receive a credit for it. The evidence at the hearing should settle this point. The Court should have taken an account in the case as to the amount and manner of expenditure and settled with the administrator accordingly.

Per Curiam.—The decree is reversed, with costs. Cause remanded, &c.

A. C. Downey and P. L. Spooner, for the plaintiff.

D. Kelso, for the defendants.

CONKLIN v. WALTZ.

A special plea of set-off which professes to answer the whole declaration, but answers only a part, is bad on general demurrer.

Monday,
May 31.

ERROR to the *Wayne* Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *Waltz* against *Conklin*. The suit is founded on a promissory note given by the defendant to the plaintiff for 175 dollars, and also on an account stated for 175 dollars. The declaration alleges as a breach, that the defendant had not paid the said several sums of money nor either of them, nor any part thereof.

The defendant pleaded two pleas. First, *nil debet*, with a notice of set-off. Secondly, *actio non*, for that one *Johanson*, on the 24th of *August*, 1847, at, &c., recovered a judgment against *Waltz*, the now plaintiff, for 162 dollars and 81 cents, with costs, which judgment had been assigned to the now defendant.

Replication to the second plea. Rejoinder to the replication. Surrejoinder to the joinder. Rebutter to the surrejoinder, and a general demurrer to the rebutter.

The Court sustained the demurrer.

The cause was submitted to the Court on the general issue and notice of set-off. Judgment for the plaintiff.

The evidence is not set out in the record; and the only question is, was the demurrer rightly sustained?

It appears to us that the second plea is insufficient; and we need not, therefore, examine the subsequent pleadings.

There are two causes of action described in the declaration. One is a promissory note for 175 dollars. The other is an account stated for 175 dollars. The amount claimed, therefore, exclusive of interest, is 350 dollars.

The second plea professes to be in bar of the whole cause of action; but relies only on a judgment for 162 dollars and 81 cents rendered against the now plaintiff in 1847.

This special plea of set-off is, therefore, bad on the ground that it professes to answer the whole cause of action, and is, at most, but an answer to a part.

The matters of set-off in a notice annexed to the general issue, or to a plea of payment, may be for a less sum than that sued for; but a separate plea of set-off stands on the same ground with other special pleas, and it must not profess to be an answer to more than it really does answer.

The judgment for the plaintiff on the demurrer is therefore right.

Per Curiam.—The judgment is affirmed, with costs.

J. Rariden and S. W. Parker, for the plaintiff.

J. S. Newman, for the defendant.

ZION and Another v. THE STATE on the Relation of NOR- RIS and Another.

Objections to the competency of witnesses in a cause tried in 1842, must have been made at the trial or they will not be noticed by the Supreme Court.

ERROR to the *Boone* Circuit Court.

Monday,
May 31.

May Term,
1852.

DAWSON
v.
WELLS.

BLACKFORD, J.—This was an action of debt commenced before a justice of the peace. The suit was brought by *The State* on the relation of *Nelson* and *Charles C. Norris*, against *Campbell*, *Zion*, and *Vanhook*. *Campbell* was a justice of the peace, and the other defendants were his sureties. The suit was on their bond.

The justice gave judgment for the plaintiff, and the defendant appealed to the Circuit Court. Judgment in the Circuit Court for the plaintiff.

The cause was tried in the Circuit Court in 1842. On the trial, the plaintiff offered two witnesses, who were both objected to, but the objection was overruled. The ground of objection to the witnesses does not appear to have been shown to the Circuit Court, and we cannot, therefore, say that, as the law then stood, the objection should have been sustained.

The evidence is spread on the record, and shows very clearly that the judgment for the plaintiff is right.

Per Curiam.—The judgment is affirmed, with 5 *per cent.* damages and costs.

W. Quarles, for the plaintiffs.

C. C. Nave, for the defendant.

DAWSON and Another v. WELLS.

A justice of the peace has no jurisdiction of a cause where his brother-in-law is the plaintiff; and a judgment for the plaintiff in such a case is *coram non judice* and void.

The plaintiff who causes an execution to be issued on such a judgment and the justice who issues it being thus related, are liable in trespass *de bonis asportatis* to the party whose goods are sold under the execution.

Monday,
May 31.

ERROR to the Dearborn Circuit Court.

BLACKFORD, J.—*Wells*, in October, 1850, brought an action of trespass *de bonis asportatis* against *Dawson* and *Dills*. The defendants pleaded not guilty. The cause was afterwards, at the October term, 1850, tried, and a verdict and judgment rendered for the plaintiff.

The following are the facts :

The defendants, *Dilts* and *Dawson*, are, and have been for many years, brothers-in-law, and were so on the 8th of *January*, 1850; which fact was known to them both, and to said *Wells*. *Dawson* was a justice of the peace; and, on said 8th of *January*, 1850, *Dilts* commenced a suit before *Dawson*, as such justice, against said *Wells*, on a promissory note. The process issued by said justice was duly served; but *Wells* failed to appear to the suit, and judgment was rendered against him by default. *Dilts*, afterwards, caused said justice to issue a *fiery facias* on said judgment, and, under that execution, certain goods of *Wells* were taken and sold.

The present suit is for the taking of those goods. The said judgment-plaintiff, and the justice, are the defendants.

The main question to be decided is, whether or not the justice who issued the execution under which *Wells's* goods were sold, had jurisdiction of the cause?

The statute says, that no justice of the peace shall have cognizance of any action by or against any person or persons with whom he may be related in any of the degrees of affinity or consanguinity. R. S. p. 863. By this statute, justice *Dawson*, as the brother-in-law of *Dilts*, had no jurisdiction of the cause; and his judgment is *coram non judice* and void. This opinion is in accordance with a decision in *Vermont* under a statute similar to ours. *Hill v. Wait*, 5 Vermont Rep. 124.

The judgment of the justice being absolutely void, he and the judgment-plaintiff are liable in trespass *de bonis asportatis* to the party whose goods were sold under the execution.

The Court, on the plaintiff's motion, instructed the jury as to the law governing the case. The instruction is in accordance with the opinion we have above expressed, and is unobjectionable.

Some instructions asked for by the defendants were refused. One of them was objectionable, as stating the proceedings of justice *Dawson* not to be void, but only voidable, and the others were irrelevant (1).

May Term,
1852.

DAWSON
V.
WELLS.

May Term,
1852.

STATE BANK
OF INDIANA

v.

HAYES.

Per Curiam.—The judgment is affirmed, with costs.

A. Brower, for the plaintiffs.

E. Dumont, for the defendant.

(1) This case overrules that of *Eastwood v. Buel*, 1 Carter's Ind. R. 434.

THE STATE BANK OF INDIANA v. HAYES.

A bill of exchange drawn in this state, payable in another of the *United States*, is a foreign bill.

A protest is necessary to charge the indorser of a foreign bill.

In a suit against the indorser of a foreign bill, there being no evidence of a protest, the jury were instructed to find for the defendant. *Held*, that the instruction was correct.

A plaintiff who has voluntarily abandoned his suit has no right to an appeal.

Monday,
May 31.

APPEAL from the *Dearborn* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by *The State Bank of Indiana*, as indorsee of a bill of exchange, against *Jacob Hayes*, as indorser. The bill was drawn at *Lawrenceburgh*, in this state, on one *Henry Raymond*, *New Orleans*. The defendant pleaded the general issue.

On the trial, the plaintiff introduced the bill of exchange described in the declaration, and proved the drawee's acceptance and the defendant's indorsement. She then offered in evidence a protest of the bill, but the evidence was objected to, and the objection sustained. The cause was submitted to a jury. There being no evidence of the dishonor of the bill, the Court instructed the jury to find a verdict for the defendant. The plaintiff thereupon suffered a non-suit, and a judgment for costs was rendered against her.

The bill of exchange was a foreign one. *Buckner v. Finley*, 2 Peters, 586; and a protest was, therefore, neces-

sary to charge the indorser. Byles on Bills, 149. There being no evidence of a protest, the jury were correctly instructed to find for the defendant. *Crookshank v. Kellogg*, 8 Blackf. 256.

May Term,
1852.
PHILLIPS
v.
RICARDS.

As the plaintiff voluntarily abandoned her suit, she can have no right to an appeal. *Evans v. Phillips*, 4 Wheaton, 73.

Per Curiam.—The appeal is dismissed with costs.

P. L. Spooner, for the appellant.

A. Brower, for the appellee.

PHILLIPS and Others v. RICARDS and Another.

A decree of foreclosure which directs that the whole instead of only a part of the mortgaged premises shall be sold to satisfy the mortgage-debt, will be held to be correct where it does not appear that the premises were worth more than the amount of the debt.

APPEAL from the *Jefferson* Circuit Court.

Monday,
May 31.

BLACKFORD, J.—This was a bill in chancery, filed in 1849 by *Ricards* and *Hoffman*, to foreclose a mortgage, which mortgage was on a lot in the city of *Madison*. *William H. Phillips*, the mortgagor, was one of the defendants. *Robert Phillips*, *John I. Phillips*, *James W. Phillips*, and *Robert W. Phillips*, to whom said mortgagor had, subsequently to said mortgage, mortgaged the same lot, were also defendants. *Oliver S. Pitcher*, to whom said mortgagor had mortgaged the same lot subsequently to the last-mentioned mortgage, was also a defendant.

The complainants' mortgage, as the bill states, was executed on the 24th of *May*, 1848, and was given to secure the payment of three notes of hand; one of which notes had been paid before the bill was filed. The others were due.

The bill alleges the second mortgage to have been exe-

May Term,
1852.

PHILLIPS
v.
RICHARDS.

cuted about the 22d of *December*, 1848, and the third about the 7th of *March*, 1849.

There was a decree *pro confesso* against the mortgagor, and also against the mortgagees of the second mortgage.

Pitcher, the mortgagee of the third mortgage, filed an answer stating there was due on his mortgage about the sum of 1,500 dollars, and praying that the mortgagor might answer as to the amount due, and that the premises might be sold to pay off this third mortgage.

The cause was submitted to the Court on the bill, answer of *Pitcher*, and the exhibits.

The Court, at the *March* term, 1850, decreed as follows:

That there was due to the complainants on their mortgage the sum of 653 dollars and 52 cents; and that the mortgagor should pay the same on or before the 9th of *September* then next following; that if such payment were not made, the premises should be sold, &c., and the surplus money, after paying the complainants' demand and the costs of sale, be brought into Court to await its further order.

It was also decreed that the subsequent mortgagees might, at any time before said sale, pay off the said sum due the complainants; and that, in case of such payment, the sale should not be made.

It was also ordered that the answer and cross-bill of *Pitcher* should stand for further hearing; that the complainants recover their costs of the mortgagor, and that the cause be continued.

The first objection made to this decree is, that there was no answer to *Pitcher's* cross-bill. There was nothing, however, in that cross-bill, if it can be so called, for the complainants to answer, nor does it call upon them to answer it.

The second objection made to the decree is, that it directs a sale of the whole, instead of only a part, of the mortgaged premises. It is a sufficient answer to this objection, that it does not appear that the premises were worth more than the amount of the debt.

The unpaid notes and the mortgage were the only evidence in the cause. The decree fixes correctly the amount of the debt, gives the defendants a reasonable time to redeem, and orders a sale in case of non-payment. It appears to us that the decree is right.

Per Curiam.—The decree is affirmed, with 6 per cent. damages and costs.

J. W. Chapman, for the appellants.

J. Sullivan, for the appellees.

May Term,
1852.

BLODGET
v.
THE STATE.

BLODGET v. THE STATE.

An indictment for retailing spirituous liquor, charged that the liquor was sold to a person whose name was unknown to the grand jurors. One witness only was examined at the trial, and he testified to whom the liquor was sold, that he was a witness before the grand jury when the indictment was found, and that he then knew the name of the person to whom the liquor was sold, and would have disclosed the name to the grand jury if they had inquired what it was. *Held*, that as the grand jury, upon proper inquiry of the witness, could have ascertained the name, the indictment could not be sustained.

ERROR to the *Switzerland* Circuit Court.

Thursday,
June 3.

BLACKFORD, J.—This was an indictment against *Blodget* for retailing spirituous liquor without license. The indictment charges the liquor to have been sold to a person whose name was unknown to the jurors. Plea, not guilty. Cause submitted to the Court, and judgment rendered for the state. Motion for a new trial overruled.

There was but one witness examined on the trial. He stated that the sale of the liquor was made to one *Eli Morrison*; that he knew said *Morrison* and his name; and that he would have informed the grand jury of *Morrison's* name if they had asked him what it was, but they did not make the inquiry.

Chitty says, that it is in general necessary to set forth the names of third persons with sufficient certainty; but

May Term,
1852.

HALSEY

v.

MATTHEWS.

that there are some cases in which the name of third persons cannot be ascertained, in which it is sufficient to state "a certain person or persons to the jurors aforesaid unknown." Thus an indictment for harboring thieves unknown is sufficient, from the necessity of the case, and the fair presumption which exists that their names cannot be ascertained. So, upon the same ground, if the dead body of a person murdered be found, and it is impossible to discover who he was, an indictment for having killed some one unknown would be valid. 1 Chitty's Crim. Law, 211, 212. The same doctrine is laid down in *Hawkins*. 2 Hawk. Pleas of the Crown, p. 231.

We think it was the duty of the grand jury, in the case before us, to inquire of the witness before them for the name of the person to whom the liquor was sold. It appears that if they had made the inquiry, the name would have been given to them.

This indictment would not have been sustained, had the evidence on the trial shown that the name of the third party was known to the grand jury when the indictment was found. *Rex v. Walker*, 3 Campb. 264, and note. We are of opinion, also, that it ought not to be sustained in the present case where the name might have been ascertained by the grand jury if they had made the proper inquiry of the witness whom they were examining.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. Dumont, for the plaintiff.

D. Wallace, for the state.

HALSEY v. MATTHEWS.

Trespass quare clausum fregit. Plea, *liberum tenementum*. Replication, by way of new assignment, as follows: That the piece of land in the declaration mentioned was and is a certain close, situate, &c., and bounded as follows (the boundaries are here set out); that said close now is

and at said time when, &c., was in the lawful and peaceable possession of the plaintiff; which said close now is, and, at said time when, &c., was another and different close from the said close in the said plea mentioned and therein alleged to be the soil and freehold of the defendant. Verification. *Held*, that the new assignment was sufficient.

A fact in issue, and which was necessary to have been proved to authorize the judgment of the Circuit Court, will be presumed to have been proved, if the record does not show the contrary.

In trespass *quare clausum fregit*, where the unlawful breaking into the plaintiff's close is established, it is not material to his right to recover, whether the matter of aggravation alleged is proved or not.

APPEAL from the Decatur Circuit Court.

BLACKFORD, J.—This was an action of trespass *quare clausum fregit*. Pleas, not guilty and *liberum tenementum*. New assignment. Pleas to the new assignment, not guilty and *liberum tenementum*. Replication to the last plea of *liberum tenementum*, that the close belonged to the plaintiff. Verdict and judgment for the plaintiff.

The declaration alleges that the defendant, on, &c., at, &c., broke and entered the plaintiff's close situate in *Fugit* township, *Decatur* county, *Indiana*, and then and there turned in and upon said close a large number of hogs, &c., which hogs tore down and destroyed the plaintiff's corn growing on said close, &c., of the value of 200 dollars, &c. Damage 500 dollars.

The new assignment states that the piece of land in the declaration mentioned was and is a certain close, situate, &c., and bounded as follows (the boundaries are here set out); that said close now is, and at said time when, &c., was, in the lawful and peaceable possession of the plaintiff; which said close now is, and at said time when, &c., was, another and different close from the said close in the said plea mentioned and therein alleged to be the soil and freehold of the defendant. And this he is ready to verify, &c.

The defendant makes two objections to the proceedings in this case.

The first is, that the new assignment is insufficient. This new assignment agrees with the precedent in 3 Chitty's Pleading, p. 1217, except that it has the following words, namely: "which said close now is, and at said

May Term,
1852.

HALSEY
v.
MATTHEWS.

Thursday,
June 3.

May Term,
1852.

HALESY
v.
MATTHEWS.

time when, &c., was, in the lawful and peaceable possession of the plaintiff." Those words are not in said precedent; but we cannot see how they can injure the new assignment. They may be considered as mere surplusage. The object of a new assignment, in a case like the present, is merely to give a more particular description of the close than the declaration gives, and to show that the close is a different one from that mentioned in the plea. That object is surely accomplished by the new assignment before us.

The second objection is the refusal of the Court to give the following instruction to the jury, namely: "If the jury believe from the evidence that the corn and other property mentioned in the declaration and therein alleged to have been destroyed, belonged to one *William Matthews*, and not to the plaintiff, they may find for the defendant."

We cannot say that the Court was bound to give that instruction. The destruction of the property on the premises is alleged as matter of aggravation; and it does not necessarily follow that because that property belonged to a stranger, the jury might correctly find a verdict for the defendant. If the cause of action, to-wit, the defendant's unlawful breaking into the plaintiff's close described in the new assignment, was proved to the satisfaction of the jury, and we must presume it was, the record not showing the contrary, it was not material to the plaintiff's right to recover, whether the matter of aggravation was proved or not.

Per Curiam.—The judgment is affirmed, with 6 per cent. damages, and costs.

A. Davison, for the appellant.

J. Robinson, for the appellee.

WARD and Others v. MACCOUN.

May Term,
1852.WARD
v.
MACCOUN.

A *bona fide* payment of a debt to an agent of the creditor authorized to receive it, is a payment to the creditor, even though the agent misappropriate the amount received in payment.

ERROR to the *Hendricks* Circuit Court.Thursday,
June 3.

PERKINS, J.—*James Maccoun* filed his bill in chancery setting forth that in the spring of 1841, being the owner of a tract of land in *Hendricks* county, *Indiana*, known as the east half, &c., he, through *Peter Fry*, sold said land to one *George Fry*, of *Clark* county, *Kentucky*, who was trustee for the wife and children of said *Peter*, for the sum of 1,500 dollars, to be paid, 500 dollars in hand, 300 dollars on the 25th of *December*, 1841, 300 dollars on the 25th of *December*, 1842, and 400 dollars on the 25th of *December*, 1843, with interest; that he received from said *George Fry*, by the hand of *Peter*, 510 dollars, and executed to *George* a bond to convey to him in trust for the wife and children of said *Peter*, the land mentioned, on receiving full payment; that he subsequently received a further payment of about 200 dollars; that the money paid, and to be paid, for said land, was part of a sum placed by the father of said *Peter Fry* in the hands of said *George*, in trust, to be by him appropriated for the use of the wife and children of said *Peter*; that said *Peter*, with his family, went into possession of the land under the title-bond, and enjoyed the rents and profits, worth 150 dollars a year; that the balance of the purchase-money was unpaid, and that *George Fry*, some years ago, departed this life and was succeeded in the office of trustee by *Almanzer C. Ward*, who, as such trustee, had a large amount of money in his hands, and of whom payment had been demanded upon the execution of a conveyance. The bill called particularly upon *Peter Fry* and wife to discover in their answer and say what amount of the purchase-money was still unpaid, and asked that a decree for payment and the sale of the land might be rendered.

May Term,
1852.

WARD
v.
MACCOUN.

The proper parties were made. A part of the defendants were infants, who made the usual answer by a guardian *ad litem*, asking proof of the bill and the protection of the Court.

Peter Fry and his wife *Lucinda* answered. They admit the purchase of the land by *George Fry* as trustee, &c., at the price of 1,500 dollars, and that 510 dollars were paid in hand. They charge that there was a mortgage on the land to the sinking-fund of 400 dollars, which was concealed at the purchase, but was subsequently assumed by *Fry* and deducted by *Maccoun* from the 1,500 dollars, the price of the land; "and they further answer and say that *George Fry*, trustee as aforesaid, on the 9th day of *April*, 1842, paid to the plaintiff, out of the moneys which he held as aforesaid in trust for the said *Lucinda Fry* and her children, on said land-contract, and in part payment thereof, the further sum of 600 dollars; and the said plaintiff, with the intention of cheating and defrauding the said *George Fry* and *Lucinda Fry*, and her children, applied the same as a credit on an account which *Peter Fry* owed the firm of *J. and R. C. S. Maccoun* [composed of the plaintiff, *James*, and said *R. C. S. Maccoun*], without the consent of the said trustee, or the said children, or the said *Peter* and wife," &c. They admit the death of *George Fry*, and the appointment of said *Ward* as his successor in the trust, who, they state, in *April*, 1845, paid upon said land-contract the further sum of 242 dollars. They assert that the trustee has already overpaid for the land, and pray that a deed may be decreed to him subject to said sinking-fund mortgage. They also state that the statute of limitations would be a bar, were anything yet due upon said land.

Ward answered so far as he was acquainted with the facts, which was but to a limited extent.

No replications were filed.

Depositions were taken, and the cause submitted to the Court, who found that a part of the purchase-money was unpaid, and decreed for the plaintiff accordingly.

The only principle of law involved in the case before

us is this: that a *bona fide* payment of a debt to an agent of the creditor authorized to receive it, is payment to the creditor, even though the agent misappropriate the amount received in payment; and this principle is not controverted. The disputed question in the cause arises entirely upon the evidence in relation to the single item of 600 dollars set up in the answers as having been paid on the 9th of *April*, 1842, towards the purchase of the land in question. As to the terms of purchase, including the price of the land; as to the payment of 510 dollars in hand, the assumption of the mortgage of 400 dollars, and the payment of 242 dollars and 67 cents in *April*, 1845; there is no doubt. It is equally clear that *George Fry*, the trustee, did, on or about the 9th of *April*, 1842, part with the 600 dollars in question, being a portion of the trust fund mentioned in the bill and answers as being in his hands; that he gave it to *Ward Maccoun*, a son of the plaintiff, who called upon said trustee in *Kentucky* for it, as a payment upon the land in controversy. *Ward Maccoun* delivered the money to *R. C. S. Maccoun*, the mercantile partner of the plaintiff, *James*, who used it in the purchase of goods, and refused to account for it to *James*, but credited the account of *Peter Fry* with it on the books of the firm. Whether *James Maccoun*, the plaintiff in the bill, authorized and directed *Ward Maccoun* to call upon said trustee and receive the payment, is the question. The evidence is, much of it, circumstantial, is somewhat voluminous and conflicting, and we shall not incorporate it into this opinion. We think the preponderance is that said *James* did authorize and direct said *Ward* to call and receive the payment, and that he is, in consequence, bound by it. He must recover it from *Ward*, or from *J. and R. C. S. Maccoun*. The land has been fully paid for.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

C. C. Nave, for the plaintiffs.

A. A. Hammond, *H. O'Neal*, and *J. S. Harvey*, for the defendant.

May Term,
1852.

WARD
v.
MACCOUN.

May Term,
1852.

O'NEAL
v.
WADE.

O'NEAL v. WADE.

In replevin, damages cannot be assessed beyond the amount claimed in the declaration.

The party, who by his pleading has tendered an immaterial issue, cannot have the judgment reversed because the case was tried on that issue, and the judgment was, therefore, not decisive of the merits.

To the declaration on a replevin-bond the defendant pleaded that the plaintiff ought not to maintain his action, because the suit in replevin was dismissed by agreement of the parties. *Held*, that the plea was bad: 1. Because it attempted to show a discharge of a specialty by parol; 2. Because the agreement would not include an agreement to dispense with a return of the property, without which the dismissal would itself be a breach of the condition of the bond.

Thursday,
June 3.

ERROR to the *Washington* Circuit Court.

PERKINS, J.—Debt upon a bond given by a plaintiff in a replevin suit. Breach, that said suit was not prosecuted, &c., nor the property returned, &c. Damages claimed, 50 dollars.

The defendant pleaded that the suit on said bond ought not to be sustained, because, he said, said suit in replevin was dismissed from Court by the agreement of the parties thereto.

The plaintiff replied that said suit was not dismissed by the agreement of parties, but upon the sole suggestion and motion of the plaintiff therein, concluding to the country. Issue.

The cause was submitted to the Court for the trial of the issue, and for the assessment of damages in case the issue should be found for the plaintiff.

The Court found for the plaintiff and assessed damages in the sum of 163 dollars and 56 cents. Motions to set aside the assessment of damages, and for a new trial, were overruled, and final judgment was rendered upon the finding of the Court.

It is claimed that two errors in the proceedings below are apparent from the record, for which the judgment should be reversed.

1. It is said the Court erred in assessing damages in an amount beyond that laid in the declaration, and this

position we think well taken. It is certainly the general rule that the sum claimed in the declaration limits the amount to be recovered, and we see no reason which should make the present case an exception. 1 Chit. Pl. 372.—1 Swan's Pr. 186, note *n*.—*Watkins v. Morgan*, 6 C. and P. 661.

2. It is insisted that the plea was bad, the issue formed and tried immaterial, and, hence, the finding not decisive of the merits of the cause.

Supposing this to be true, the plaintiff in error could not have a reversal of the judgment on account of it, for the reason that he committed the first fault in pleading and the judgment was against him. Had it been for him, a repleader would have been awarded. *Conard v. Dowling*, 8 Blackf. 38.—*Ramsey v. Kochenour*, id. 325. As we reverse the case, however, upon another ground, and the reversal must extend back to the first error, an opinion should be expressed as to the validity of the plea; and we think it clearly bad for two reasons: 1. It attempts to set up a parol dispensation of an obligation evidenced by a sealed instrument. This cannot be done. *Woodruff v. Dobbins*, 7 Blackf. 582. 2. The agreement set up in the plea, even had it been under seal, would have constituted no bar to the action. That agreement was, according to the plea, that the suit of the plaintiff might be dismissed. The defendant in a suit would most generally be willing to agree that the plaintiff might dismiss it. But that agreement simply might not discharge the plaintiff from the consequences resulting from the dismissal. The plaintiff in replevin gives bond to prosecute the suit to a successful termination, or to return the property replevied. The object of the defendant is to defeat such successful prosecution. A dismissal of the suit is a failure to make such prosecution; and, if not accompanied by a return of the property, is a breach of the bond. Now, a simple agreement that the plaintiff might dismiss the suit, would not include an agreement to dispense with a return of the property.

May Term
1852.

O'NEAL
v.
WADE.

May Term, 1852. HENRY v. SCOTT.	<i>Per Curiam.</i> —The judgment is reversed back to the rule to plead, with costs. Cause remanded, &c. <i>H. P. Thornton</i> , for the plaintiff. <i>R. Crawford</i> , for the defendant.
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HENRY v. SCOTT.

Debt by the assignee of promissory notes against the maker. Plea, that after the assignment, he had paid the notes to the payee, with the assent of the plaintiff, in goods, &c. Issue on the plea. Held, that general evidence of the delivery of goods, &c., by the defendant to the payee after the assignment, was admissible to go to the jury.

In a suit by the assignee of a note against the maker, the latter may plead and prove that the plaintiff holds the note merely as a trustee of the payee, in order to let in as a set-off an indebtedness of the maker to the defendant.

Thursday,
June 3.

ERROR to the *Ohio* Circuit Court.

PERKINS, J.—Debt by *William Henry* against *John Scott*. The suit is upon notes given by said *Scott* to one *Horace Brown*, and by him assigned to the plaintiff. To the special counts upon the notes the defendant pleaded that he had, after their assignment, paid said notes to *Brown*, the payee, with the assent of the plaintiff, the assignee, which payment was made in goods, &c. There were three pleas substantially alike. The plaintiff replied, that the defendant had not, with his assent, paid said notes to the payee, &c. Issue. The common counts were appended to the declaration, and the general issue pleaded to them, but no question arose on the trial except those under the issues growing out of the special counts.

The cause was submitted to a jury; and the defendant having given evidence in support of his pleas of payment tending to show that *Henry*, the plaintiff, had directed him to pay the notes to *Brown*, and that he had delivered money, &c., to *Brown*, the plaintiff called a wit-

ness and propounded to him the following questions, viz.: what do you know of *Horace Brown* letting *John Scott*, the maker of the notes, and defendant to the suit, have a wood-boat? If anything, when was it? What was said boat worth? Tell all about it. Also, what do you know, if anything, about *Horace Brown's* son working for said *John Scott*? If anything, when was it? How long did he labor for him, and what was his labor worth? Which questions the Court would not suffer the witness to answer, on the ground that they were irrelevant.

We think the Court erred in refusing to suffer the witness to testify.

The defendant pleaded that he had paid the notes to *Brown*, by the permission of *Henry*, after their assignment to the latter, by the delivery of money, goods, &c., to said *Brown*. Such payment was a good defense. Payment of the amount of the notes to another by the direction of the plaintiff, was, in legal effect, a payment to him. The plaintiff replied that the defendant had not so paid the notes. This was the question for trial. Now, when the defendant had proved that he had delivered money and goods to *Brown*, the question arose, for what purpose, or on what account were they so delivered? This question was for the jury; and to enable them to rightly determine it, it was necessary that they should hear all the evidence in relation to the matter; and it seems to us that it was relevant for the plaintiff to show that the defendant, *Scott*, was indebted to *Brown* for other considerations than the notes, on which, the jury might, perhaps, infer, from the evidence, the money and goods were delivered and not in payment of the notes.

There was some evidence tending to show that the plaintiff, *Henry*, held the notes by assignment, simply as trustee for *Brown*. If he did so hold them, the defendant had a right to plead and prove that fact, as a ground for being permitted to set off, against said notes, any indebtedness of *Brown* to him. *Forkner et al. v. Dinwiddie*, in this Court, *November* term, 1851 (1).

May Term,
1852.

HENRY
v.
SCOTT.

May Term,
1852.

ALDEN
v.
BARBOUR.

Per Curiam.—The judgment is reversed with costs.
Cause remanded, &c.

D. S. Major and A. Brower, for the plaintiff.
D. Kelso, for the defendant.

(1) *See ante*, p. 34.

ALDEN and Others v. BARBOUR and Others.

A bill of exchange drawn payable at the *Ohio Life Insurance and Trust Company, Cincinnati*, was described in a count in the declaration against the acceptors as payable generally. *Held*, that there was a variance.

When a bill is made payable at a particular place, a general acceptance is, in legal effect, an acceptance to pay at the place designated in the bill.

A count in a declaration against the acceptors of a bill of exchange described the bill as drawn payable generally, and as accepted to be paid at the *Ohio Life Insurance and Trust Company, Cincinnati*. The bill offered in evidence, which corresponded with that described in other respects, was drawn payable at said *Ohio Life Insurance and Trust Company, Cincinnati*, but accepted generally. *Held*, that the variance might have been obviated, by amendment, under the R. S. 1843, at the trial, but it not having been done, the Supreme Court was bound to make the amendment, or regard it as made, and treat the bill as given in evidence under said count.

A judgment of the Circuit Court will not be reversed for an erroneous ruling of the Court, when the party complaining has not been injured thereby.

Thursday,
June 3.

ERROR to the *Bartholomew* Circuit Court.

PERKINS, J.—*Lucius Barbour, Ira D. Owen, and Lucius C. Buell* brought an action of assumpsit against *William Snyder and Charles O. Alden*. The declaration was composed of two special, and the common, counts.

The first count charged that the defendants, by the name and description of *Snyder and Alden*, heretofore, &c., made their certain promissory note, &c. No question arises on this count, and it need not be more fully set out.

The second count charged that the plaintiffs, by the

name of *Barbour, Owen, and Buell*, drew a bill of exchange directed to the defendants, by the name of *Snyder and Alden*, and thereby requested them to pay to the plaintiffs, ninety days after date, 533 dollars and 23 cents, which said bill of exchange said defendants, by the name of *Snyder and Alden*, accepted, payable at the *Ohio Life Insurance and Trust Company, Cincinnati, Ohio, &c.*

May Term,
1852.

ALDEN
v.
BARBOUR.

There was a suggestion of not found as to *Snyder*. *Alden* appeared and called for a bill of particulars and an inspection of the note and bill of exchange declared on, and, according to our understanding of the record, they were furnished him. He thereupon pleaded the general issue without oath. The cause was submitted to the Court, and there was a judgment for the plaintiffs.

On the trial, the plaintiffs gave in evidence, without objection, the note described in the first count of the declaration. They then offered in evidence the bill of exchange, reading as follows:

"\$533 23. *Madison, June 13, 1850.* Ninety days after date, pay to the order of ourselves at the *Ohio Life Insurance and Trust Company, Cincinnati*, 533 dollars and 23 cents, without relief from valuation or appraisement laws, value received, which charge to account of yours. *Barbour, Owen, and Buell.* To Messrs. *Snyder and Alden, Columbus, Indiana.* 11—14 September."

On the face of said bill was written "Accepted. *Snyder and Alden.*"

The indorsements need not be set out. The defendant objected, says the bill of exceptions, "to said bill of exchange being read in evidence, because of a variance between it and the bill described in the second count of the declaration, in this, that said bill described in said second count is stated therein to be payable generally, without specifying the place of payment; and is averred to have been accepted payable at *Cincinnati*, when it was simply 'accepted.' The plaintiffs then proved the acceptance to be signed by *Alden*, and that *Alden* and *Snyder* were partners at the time of said acceptance, and offered said bill and acceptance under the common counts; to which the

May Term,
1852.

ALDEN
v.
BARBOUR.

defendant objected, because said plaintiffs had not proved that the *Snyder* who was the partner of *Alden* was the defendant *Snyder*, nor had they proved his christian name, nor that the plaintiffs had executed the bill as drawers, nor that they were partners; but the Court overruled the objection," &c.

In 1 Chitty's Pl. p. 309, it is said: "In actions upon bills of exchange and promissory notes, many cases of variances have arisen in consequence of the acceptance or promise being stated to be general and absolute, when in fact it was qualified, the bill or note having been made payable at a particular place. With respect to bills of exchange, an acceptance payable at a particular place is not now a qualified acceptance, unless the payment be expressly restricted to that place *only and not elsewhere*; but in cases where it is so restricted, and also in all cases of promissory notes made payable in the body of the note at a particular place, it will be a variance to state a qualified contract of this description as an absolute one. And, on the other hand, where the contract is absolute and is described in the declaration as conditional or qualified, the variance will be equally fatal as where in declaring on a promissory note the plaintiff alleged that it was made payable at a particular place, and it appeared on the production of the note, that there was no such restriction contained in the body of the note, but merely in a memorandum at the foot of it, it was held that this was a general and not a qualified promise, and that consequently there was a material misdescription."

There was, then, a variance between the bill of exchange and the count upon it, in the omission to state the particular place of payment. There was no variance in regard to the acceptance. It was, in legal effect, an acceptance to pay at the bank designated in the bill. Supposing, then, the bill of exchange was not admissible, without further evidence as a foundation for it (a point we do not decide), under the common counts, the question arises, has the plaintiff in error been injured by any rulings of the Court below? For if he has not, he cannot,

according to our statute and the previous decisions of this Court, claim a reversal of the judgment of the Circuit Court on account of those rulings, even though erroneous. We think said plaintiff has not been injured. The variance as to the bill of exchange could have worked no prejudice to him. From the description given of it in the declaration, he would not have mistaken the bill, and he could have had, and it seems did have, an inspection of it before pleading. Besides, the variance might have been obviated on the trial below, and the bill given in evidence under the second count. R. S. p. 715, s. 240. Such being the case, this Court is bound to make the amendment, or regard it as made, treat the bill as given in evidence under that count, and affirm the judgment. R. S. p. 638, ss. 84, 85. *Saxton v. The State*, 8 Blackf. 200 (1). The bill was offered below under the second count.

May Term,
1852.

ALDEN
v.
BARBOUR.

Per Curiam.—The judgment is affirmed with 1 *per cent.* damages and costs.

J. G. Marshall, for the plaintiffs.

A. A. Hammond and *H. O'Neal*, for the defendants.

(1) The R. S. 1852 enact that no variance between the allegations in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. When it is alleged that the party has been so misled, that fact must be proved to the satisfaction of the Court, and it must be shown in what respect he has been misled; and thereupon the Court may order the pleading to be amended upon such terms as may be just. Where the variance is not material in the sense stated, the Court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. R. S. 1852, vol. 2, p. 46.

The Court may, also, at any time, in its discretion, and upon such terms as may be deemed proper, for the furtherance of justice, direct the name of any party to be added or struck out; a mistake in name, description, or legal effect, or in any other respect, to be corrected; any material allegation to be inserted, struck out, or modified to conform the pleadings to the facts proved; when the amendment does not substantially change the claim or defense. *Ib.* p. 48.

May Term,
1852.

WOOD *v.* COMMONS.

WOOD
v.
COMMONS.

The setting aside of a special plea cannot be complained of when another remains under which the defense set up in the former plea could be proved in bar of the action.

A judgment will not be reversed because an erroneous instruction was given to the jury, if it could have done the party complaining no injury.

Thursday,
June 3.

APPEAL from the *Union Circuit Court*.

PERKINS, J.—Case for slander. The declaration alleged that the defendant had said of the plaintiff that “he stole wheat;” and that “he stole grain.” Pleas, the general issue and justification. Issues of fact; trial by jury; verdict and judgment for the plaintiff for 150 dollars. The suit was commenced in *March, 1850*.

The ninth plea, being a plea of justification, was, “that heretofore, to-wit, on the 1st day of *October, 1849*, at, &c., said plaintiff did steal, &c., two bushels of wheat, the property of one *John Cromwell*, of the value,” &c.

The tenth was, that, heretofore, to-wit, on the 1st day of *July, 1849*, said plaintiff did steal, &c., two bushels of wheat, the property of one *John Cromwell*, of the value, &c.

The Court set aside said tenth plea. This is assigned for error. It does not appear that the defendant below was injured by the act complained of. He could have proved a larceny of wheat on the 1st of *July, 1849*, under the ninth plea, if at all; and that would have made out the defense set up in both of said pleas, viz., the stealing of wheat by the plaintiff below from *John Cromwell*.

The Court gave this instruction to the jury, viz.:

“The charge in the declaration is, that the defendant charged that the plaintiff stole wheat; and the defendant must prove that the plaintiff feloniously stole wheat as alleged in some one of his pleas. Proof that he stole flour or any other article would not be sufficient to justify the charges in the declaration.”

This instruction is complained of, and it did not accurately present to the jury the facts alleged in the plead-

ings. The declaration averred that the defendant had charged the plaintiff with stealing wheat, and with stealing grain. And among the pleas of justification were some alleging that the plaintiff did steal rye and corn; and they were good pleas of justification to the charge in the declaration of stealing grain; for rye and corn are grain, and issues were formed on these pleas. But still the defendant below was not prejudiced by the instruction, because, as applied to the evidence in the cause, it was correct. For though the plaintiff below had sued the defendant for making two charges against him, yet he proved but one, viz., that of stealing wheat. And though the defendant pleaded in justification that said plaintiff had stolen wheat and other grain, thus justifying the whole declaration, yet his evidence on the trial tended to sustain only the plea justifying the charge of stealing wheat, thus reducing the controversy in the case before the jury to a charge and justification thereof of stealing wheat alone. The instruction, therefore, considered in connection with the evidence, was right enough.

We may remark that, though wheat is embraced by the general term grain, yet as the charge as to this was of a particular kind of grain, the justification, in plea and proof, was necessarily as particular. In relation to the charge of stealing grain, a justification would be made out by showing a larceny of any kind of grain.

Per Curiam.—The judgment is affirmed with 1 *per cent.* damages and costs.

J. S. Newman and *J. S. Reid*, for the appellant.

S. W. Parker and *J. Yaryan*, for the appellee.

May Term,
1852.

EASTMAN
v.
RAMSEY.

EASTMAN v. RAMSEY.

If *A.*, for a good consideration, promises *B.* to pay him a debt due from *C.* to *B.*, the remedy for a breach of the undertaking is at law and not in chancery.

May Term,
1852.

EASTMAN
v.
RAMSEY.

Thursday,
June 3.

If A., in consideration of property conveyed to him by C., promises C. to pay a debt due by C. to B., B. cannot sue for a breach of the promise.

A Court of equity will not render a decree setting aside a conveyance of land made to hinder and delay creditors, where the bill does not pray for such decree.

APPEAL from the *Jennings* Circuit Court.

PERKINS, J.—Bill in chancery by *Abner C. Ramsey* against *Buell Eastman*. Answer, replication, proofs, and decree for the plaintiff.

The facts are, substantially, That one *Lorain Childs* was indebted to said plaintiff, *Ramsey*, in the sum of 174 dollars; and, to secure the payment of it, agreed to procure and deliver to him the note of *Buell Eastman*, payable to said *Childs* and indorsed by him, for said amount; that *Childs* did procure said note and deposited it with one *John P. Ramsey*, to be by him delivered to said *Abner C. Ramsey*, the plaintiff; that said note was offered to said *Abner C.* and by him refused, whereupon it was taken back by *Childs* and returned to *Eastman*, by whom it was destroyed; that, after this, *Childs* died insolvent without having paid said debt to *Abner C. Ramsey*, and one *John Ramsey* became the administrator upon his estate; that *Eastman* received conveyances of property from *Childs*, and said he would pay the latter's debts. *Childs's* administrator is not made a party. *Abner C. Ramsey* seeks, by this suit, to make *Eastman* pay this debt of *Childs* to said *Ramsey*; and there was a decree to that effect below.

We do not see how the decree can be sustained.

If *Eastman* promised *Ramsey*, for a good consideration, to pay to him this debt of *Childs*, said *Ramsey's* remedy upon that promise is by an action at law. Chancery has no jurisdiction.

If *Eastman* had not so promised *Ramsey*, but, in consideration of property conveyed to him, had promised *Childs* that he would pay his debt to *Ramsey*, then the remedy is not by a suit at law or in chancery by *Ramsey* against *Eastman*; but the administrator of *Childs* must sue for a breach of that promise, and *Ramsey* must look to the estate of *Childs* for satisfaction of his demand.

If, according to another view of the case, the property of *Childs* was conveyed to *Eastman* as a trustee for the payment of the former's debts, then, indeed, equity might take cognizance of the case, and the plaintiff might, perhaps, under some circumstances, had he joined the administrator of *Childs* as a party, have obtained a decree for a proportional or full payment of his claim, according as the terms of the trust and amount of property might have justified; and, could he have shown a waste of the trust estate, perhaps, though we decide nothing as to all this, he might have obtained a personal decree for his demand against the trustee. But, in this case, if any property was conveyed in trust, the evidence shows it to have been subject to incumbrances which swept it away, leaving nothing out of which the trustee could realize any amount.

If the property was fraudulently conveyed to *Eastman*, as is also suggested, to hinder and delay the creditors of *Childs*, then the conveyance was liable to be set aside, but a decree to that effect was not desired.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

H. C. Newcomb, for the appellant.

J. G. Marshall, for the appellee.

May Term,
1852.
INDIANA CENTRAL RAILWAY
COMPANY
V.
STATE OF IN-
DIANA, &c.

3 481
128 271

THE INDIANA CENTRAL RAILWAY COMPANY v. THE STATE OF
INDIANA AND THE TRUSTEES OF THE INDIANA ASYLUM FOR EDU-
CATING THE DEAF AND DUMB.

An injunction should not be granted, under the R. S. 1843, till the adverse party has had ten days' notice of the time and place of hearing the application therefor, unless the bill shows an urgent necessity that the injunction should be granted before notice can be given, and that an emergency exists which the complainant could not, by reasonable diligence, have prevented.

May Term,
1852.

INDIANA CENTRAL
RAILWAY
COMPANY

v.

STATE OF IN-
DIANA, &c.

Where a company is authorized, by an act of the legislature, to construct a railroad between two designated points, they have a right to occupy, in the construction of the road, any land of the state between those points, on the general route authorized, which may be necessary for the purpose.

The legislature may take public property for any particular public use, or delegate to a company the authority to do so, without making any provision for compensation.

The fact that the *Indiana Central Railway* has been located on some part of the tract of 80 acres of land purchased for the use of the institution for educating the deaf and dumb, does not, alone, authorize the conclusion that the uses and purposes for which the institution was located on such tract would be so materially interfered with as to justify the enjoining of the company from crossing it.

Tuesday,
June 8.

APPEAL from an interlocutory order of the judge of the *Marion* Circuit Court granting an injunction.

SMITH, J.—The bill of complaint filed in this case charges, that on the 30th of *May*, 1846, the complainants, pursuant to an authority given them by an act of the legislature, purchased eighty acres of land about one mile east of the city of *Indianapolis*, for the purpose of erecting thereon the necessary buildings, and of establishing permanently the institution of the state for educating the deaf and dumb; that a deed was taken conveying the premises in fee to the state for the use of the said trustees; that the complainants have erected thereon large, costly, and convenient buildings suitable for said purposes; that the institution has been and is in a flourishing condition, with a large number of pupils; and that the peculiar character and infirmities of the deaf and dumb require, for their safety and protection, that the asylum at which they are taught, and the grounds which they cultivate for the benefit of the institution, and upon which they exercise for their health, should not be crossed or run over by any railroad or railroad cars.

It is further charged that the said *Indiana Central Railway Company* (incorporated in the year 1847) have, since the erection of said buildings, located, and have commenced the construction of, their railroad through and over said land, making the excavations and preparing the

ground for a railroad track, without the consent of and against the protests and remonstrances of the complainants, and give out in speeches, &c., that they will construct their road over said grounds, and run upon it locomotives and cars, unless immediately restrained, to the irreparable injury of the institution and grounds, although said railroad could be conveniently located on other grounds adjoining those of the institution.

The prayer is for a temporary injunction to operate immediately, and for a perpetual injunction upon the final hearing.

There is an affidavit accompanying the bill, sworn to by one of the trustees of the asylum, in which the deponent states, in addition to the usual averment that the bill is true in substance and matters of fact, that the railway company, by their contractors or agents, were, at the time the bill was filed, at work upon said road on said land, to the injury of the ground and institution, and would, as he verily believed, before ten days, do much more injury and damage unless immediately restrained.

Upon the filing of the bill and affidavit, an injunction was granted without notice to the opposite party. From the order granting this injunction the present appeal is taken.

The first question we are required to decide is, whether the facts shown by the bill and affidavit presented such a case of emergency as authorized the granting an injunction, in vacation, without notice.

We are of opinion that they do not. The statute on this subject provides that "no injunction shall be granted, except in cases of emergency, until the adverse party has had ten days' previous notice of the time and place of making the application therefor," unless the application be made in open Court, &c. R. S. c. 46, s. 129. What constitutes such a case of emergency as is here contemplated, is necessarily left for the determination of the judge in each particular case. But it is not every case in which injury might be done to the complainant during the ten days required for the notice, that should

May Term,
1852.

INDIANA CENTRAL RAILWAY
COMPANY
V.
STATE OF INDIANA, &c.

May Term,
1852.

INDIANA CEN-
TRAL RAILWAY
COMPANY

v.
STATE OF IN-
DIANA, &c.

be so considered. In the case of *Vance v. Workman*, 8 Blackf. 306, a bill was filed to restrain the defendants from selling certain land upon execution, and though the bill was filed on the day the sale was to take place, it was held not to be a case of emergency, no reason being assigned and no excuse offered why the bill was not filed at an earlier date. The principle here asserted is, that the complaining party must not only show that an immediate injury is about to be inflicted, but also that he could not reasonably have anticipated it in time to give the requisite notice. Otherwise the complainant might always make a case of emergency, by waiting until the act he desires to have restrained is upon the point of being done.

In the present case, all that is alleged to show that it is a case of emergency is, that the railway company had commenced making their road to the injury of the land described in the bill, and that it would, before ten days, do more injury, unless immediately restrained. It is not stated when the road was first surveyed and located, or how long before the bill was filed it was known to the complainants that the defendants had entered upon the land in question for the purpose of making their road across it. For anything that appears, therefore, the complainants may have had ample time to give notice and apply for an injunction before any injury was done to them, and there was no necessity for their waiting until the contractors had actually commenced making excavations before filing their bill.

We think the legislature did not intend to encourage *ex parte* applications of this nature, or that a judicial power operating so peremptorily and so seriously upon the rights and interests of an absent party, should be exercised when there is no urgent necessity for it, and when it does not appear that an emergency exists which the complainant could not, by reasonable diligence, have prevented.

Having decided that the facts in the case do not show such an emergency as should authorize the granting of an injunction without notice, the order appealed from might

be reversed without noticing the other points made in the argument, but as two of the questions thus raised would necessarily come up again upon the case being sent back to the Circuit Court, we have thought it our duty to consider them.

May Term,
1852.

INDIANA CENTRAL RAILWAY
COMPANY
V.
STATE OF INDIANA, &c.

The first of these refers to the right of the defendants, under the powers granted by their charter, to locate their road on land belonging to the state. If the legislature should pass an act authorizing a company to construct a railroad between two designated points, and all the land between such points was owned by the state, we think the company would be authorized to occupy so much of such land as should be necessary for their purpose. Nor can we perceive any reason why the same conclusion does not follow, when the state owns a part only of the land, upon the route which the company are authorized to take, between the points designated, so far as respects that part.

It is urged as an argument against the right of the railway company to occupy any portion of the land in question, that no provision is made in their charter for ascertaining the damages and making compensation for the occupation of land belonging to the state. But that would not be necessary if the state did not intend to require compensation to be made. The legislature may, no doubt, take public property for any particular public use, or delegate an authority to do so to a company, without making provision for compensation. It is only when private property is taken for such purposes that the constitution requires such a provision to be made.

In the present case the railway company are authorized by their charter to construct a railway in the general direction of the *National Road*, so as not to interfere with said *National Road*, from *Indianapolis* east to the state line, on the best ground for the interest of the company and for the public convenience, and to enter upon any land for the purpose of locating the railway and to procure the necessary materials. There is no averment that the road is not located in accordance with these specifications as to the line of way to be pursued, and we cannot so con-

May Term,
1852.

INDIANA CENTRAL
RAILWAY
COMPANY
V.

STATE OF IN-
DIANA, &c.

strue the charter as to say that the company are required to diverge from such a line, in order to pass around an intervening tract of land because the title is in the state, and to locate their road wholly on private property.

The bill does not state that the persons designated as trustees of the asylum are a corporation, and we have not thought it necessary, in the consideration of the present case, to look into the acts of the legislature to ascertain whether they are a corporation or merely agents of the state to manage the institution. If they are incorporated, and the state holds the title to the land merely as a trustee for their use, the question might be raised whether they are not entitled to compensation in the same manner as the owners of private property; but this question is not now before us.

Another point argued by the counsel for the appellees was, that, admitting the right to construct a railway on the land in question, a Court of Chancery has jurisdiction to restrain the appellants from so constructing it as to occasion unnecessary damage to the appellees. This position may be correct in point of law, but we do not think the facts presented by the bill before us afford sufficient grounds for such an interference. It is not charged that any injury is done or will be done to the buildings erected by the appellees, which might be avoided by a change in the location of the railway, and we do not think we should be authorized to determine, from the single fact that the railway has been located on some part of a tract of eighty acres of land purchased for the use of the institution, that the uses and purposes for which the institution was placed on that particular tract will be so materially interfered with, that the appellants should be restrained from crossing it.

Per Curiam.—The order of the judge granting the injunction is set aside, with costs. Cause remanded, &c.

C. H. Test, for the appellants.

O. H. Smith, S. Yandes, J. Morrison, and S. Major, for the appellees.

DODDS v. TONER.

May Term,
1852.DODDS
v.
TONER.

A. conveyed to *B.* a tract of land by deed of warranty. At the time of *B.*'s purchase, there was a school-house on a part of the premises then occupied by a school; *B.* was also informed that the ground on which the school-house stood was held by the school-district under a conveyance from the owner of the land, but that there was a question about the validity of the conveyance. *Held*, that *B.* was not entitled to any deduction from the purchase-money, by way of damages, on account of the location of the school-house on the premises.

ERROR to the *Shelby* Circuit Court.

Tuesday,
June 8.

PERKINS, J.—This was a bill to foreclose a mortgage on a failure of the mortgagor to pay an instalment of the money secured by it which had become due.

The mortgagor set up in his answer that he purchased the land mortgaged—near 360 acres—of the mortgagee, and received from him a deed of warranty; that said mortgage was given to secure a balance of the purchase-money for the land, and that there was a deficiency in the quantity called for by his deed of upwards of an acre, in addition to three quarters of an acre of the tract actually embraced within the boundaries given in the deed, to which the seller, the mortgagee in this case, had no title, the same having been theretofore conveyed to a certain school-district, and being then actually occupied by a school-house in which a school was taught; thus producing an aggregate deficiency of over two acres. He did not ask a rescission of the purchase on account of this deficiency, but a deduction from the purchase-money. He also claimed a large amount of damage on account of a school-house being in so close proximity to him.

The depositions of many witnesses were taken, some of whom testified that the school-house was a great damage to the farm; some, that it was none; and some, that it was a positive benefit to it. It was proved, however, that the school-house was built and occupied by a school when *Dodds* purchased; that he was informed that the ground it stood on was held by the district under a conveyance from a former owner of the land, but that

May Term,
1852.

STOCKWELL
v.
BRAMBLE.

there was a question about the validity of that conveyance.

The Court made a deduction from the instalment due, for the deficiency of the two acres and a fraction of land, at the rate per acre paid for the farm, and rendered a decree for the payment of the balance; or, in default of payment, a sale of a part of the land mortgaged, which, it was ascertained by the report of a master in chancery, could be sold without injury to the remainder. The defendant below brings a writ of error to this Court.

The purchaser of the farm was entitled to no deduction from the purchase-money in this case by way of damages on account of the location of the school-house, as he purchased with notice of its existence, location, and the condition of the title to the ground on which it stood. Whether he was entitled to any deduction or not on account of the small deficiency in quantity of the land, we need not inquire; as we are satisfied he was granted all he could have obtained, in any event, under the evidence, and the opposite party makes no complaint.

Per Curiam.—The decree is affirmed, with 1 per cent. damages and costs.

A. A. Hammond and H. O'Neal, for the plaintiff.

J. Morrison and S. Major, for the defendant.

STOCKWELL v. BRAMBLE.

The fact that a bill has been protested, does not prevent its being afterwards accepted by the drawee.

A bill, whether foreign or inland, may be accepted by parol as well as by writing.

Monday,
June 14.

APPEAL from the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was an action of assumpsit brought by *Nathan H. Stockwell*, as payee of a bill of exchange, against one *Bramble*, as the acceptor. The suit was com-

menced before a justice of the peace. *Plea, the general issue. The justice gave judgment for the plaintiff, and the defendant appealed to the Circuit Court. The cause was submitted to the Circuit Court without a jury, and judgment was there rendered for the defendant.

May Term,
1852.

STOCKWELL
v.
BRAMBLE.

On the trial in the Circuit Court, the plaintiff gave in evidence the bill of exchange described in the declaration. The following was the bill: "*New York, September 11th, 1850. Windship Bramble, Esq., Lafayette: Pay to N. H. Stockwell, or order, 76 dollars and 50 cents, and charge to account as advised. Geo. W. Hoyt.*" The bill was indorsed as follows: "*Pay J. M. Stockwell. N. H. Stockwell. Protested. W. W. W. H. T. Bramble.*" The plaintiff then offered to prove the following facts: That the witness, as the agent of the plaintiff, in due course of mail after said bill was executed, received said bill for collection; that he, as such agent, immediately after receipt of the same, called on the defendant for acceptance or payment of the bill; that defendant told the witness he would and did accept the same, and would pay it, and stated, in the same conversation, that he did not wish to have it become generally understood that he was accepting and paying *Hoyt's* drafts, and therefore would write across the face of the same, *Protested*, and sign his name thereto, which he then and there did as the same appears on the said draft; that afterwards, and after said draft was folded up and laid away, but on the same day, the defendant again promised that he would pay the draft—that he accepted the draft and would pay it in a short time thereafter.

This testimony was objected to and the objection sustained.

There was no other evidence.

We think that the parol evidence offered by the plaintiff was admissible, on the ground that it showed a valid acceptance of the bill by the defendant, after he had written on it the word *Protested*.

Suppose the word *Protested*, as written on the bill, to

May Term,
1852.

HIGMAN
v.
BROWN.

mean that the defendant refused to accept the bill, and the holder so understood that word; and suppose, also, that evidence of what the defendant said, at the time of such refusal, was objectionable as contradicting the word *Protested*, still the subsequent parol acceptance would be good. We know of no reason why the drawee of a bill, who has refused to accept the same, may not afterwards accept it. It frequently happens that a bill, after being protested for non-acceptance, is accepted by a third person *supra* protest. The following case is cited by Mr. Chitty: A foreign bill drawn on defendant was protested for non-acceptance, and returned, and afterwards defendant told the plaintiff, "if the bill comes back I will pay it," and this was held a good acceptance. Chitty on Bills, 316, note 1. It is clear, therefore, that the fact of a bill's having been protested, does not prevent its being afterwards accepted by the drawee.

The acceptance is not objectionable merely because it was by parol. By the law-merchant, a bill, whether foreign or inland, may be accepted by parol as well as by writing; Chitty on Bills, 316; and that is the law here.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

G. S. Orth and E. H. Brackett, for the appellant.

D. Mace and W. C. Wilson, for the appellee.

HIGMAN v. BROWN.

Where the plaintiff sues in debt, assumpsit, or covenant, in the Circuit Court, for more than 50 dollars, and proves on the trial a right, *prima facie*, to recover more than 50 dollars, but owing to the defendant's evidence of matters of set-off or of other matters of reduction, the judgment for the plaintiff is only for 50 dollars or for less, the plaintiff, under the R. S. 1843, is entitled to costs.

Where the evidence is not contained in the record, the Court will presume that the facts proved were such as to authorize the judgment.

ERROR to the *Tippecanoe* Circuit Court.

May Term,
1852.

BLACKFORD, J.—*Brown* commenced an action of assumpsit in the Circuit Court against *Higman* for work and labor. The amount of damages claimed in the declaration was 500 dollars. Plea, ~~the~~ general issue. Verdict for the plaintiff for 47 dollars and 50 cents. Judgment in favor of the plaintiff for the amount of the verdict and for costs.

THE STATE
v.
DRULY.

Monday,
June 14.

The alleged error is, that the Court gave the plaintiff a judgment for costs. The defendant contends that as the suit was commenced in the Circuit Court, and the verdict is for less than 50 dollars, the defendant, not the plaintiff, was entitled to a judgment for costs. To support this doctrine, the statute of 1843 is relied on. R. S. pp. 864, 865. The rule established under this statute is as follows: Where the plaintiff sues in debt, assumpsit, or covenant, in the Circuit Court, for more than 50 dollars, and proves on the trial a right, *prima facie*, to recover more than 50 dollars, but owing to the defendant's evidence of matters of set-off, or of other matters of reduction, the judgment for the plaintiff is only for 50 dollars, or for less, in that case the plaintiff is entitled to costs. *Edmonds v. Paskins*, 8 Blackf. 196.—*Dayton v. Hall*, id. 556.

In the case now before us, the evidence is not set out; and we must presume that the facts proved were such as to authorize the judgment.

Per Curiam.—The judgment is affirmed with costs.

J. Pettit and *S. A. Huff*, for the plaintiff.

THE STATE on the Relation of McCULLOUGH v. DRULY and Another.

By the R. S. 1843, a joint execution issues upon a justice's judgment against the judgment-debtor and the replevin-bail, but it is the duty of the justice to make an indorsement thereon designating which of the

May Term,
1852.

THE STATE
v.
DRULY.

defendants is principal and which the bail, and of the constable first to sell so much of the goods and chattels of the principal as he can find before he sells any of the goods and chattels of the bail, unless he is otherwise directed by the bail.

A suit will lie upon a constable's bond on behalf of a replevin-bail against the sureties of the constable for his illegal refusal to levy an execution upon the goods and chattels of a judgment-debtor subject to execution, whereby, the debtor's property having been wasted, the bail was compelled to pay the debt.

In such a suit it will be presumed, in the absence of contrary evidence, that the execution issued to the constable was a legal one, and properly indorsed.

If a constable, having an execution in his hands against a judgment-debtor and his replevin-bail, levies upon sufficient goods of the debtor to satisfy the debt, and wastes the same, and afterwards levies upon, and makes the money demanded out of, the property of the bail, the sureties of the constable will, under the R. S. 1843, be liable on his official bond to the bail.

The rule on this point is, that if the act done by the officer is performed under color of his office, his sureties are responsible.

Monday,
June 14.

ERROR to the *Wayne* Circuit Court.

PERKINS, J.—This is an action of debt upon a constable's bond by *The State*, on the relation of *Harvey McCullough*, against *Levi Druly* and *Curtis Parks*, the sureties in said bond, the principal, *Joseph M. Morton*, being dead. Two breaches are assigned in the declaration.

1. That within a year after the qualification of said *Morton* as constable, to-wit, on the 28th of *April*, 1849, an execution, called a *fi. fa.*, came to his hands, having been issued by a justice of the peace duly authorized, &c., upon a judgment for the sum of, &c., duly rendered by said justice in favor of *Moffit* and *Snyder* against *Aaron Druly*, which execution was against said *Druly* and *Harvey McCullough*, the replevin-bail to the judgment, and which, said *Morton*, for a long time, wilfully refused to levy on the property of said *Druly*, although he had a sufficiency subject to execution to satisfy it, whereby, afterwards, said *Druly's* property having been, during said delay in levying, wasted, said constable found it necessary to, and did, levy upon, and make the money on said execution out of, the property of said relator, *McCullough*.

2. That the constable levied said execution upon a sufficiency of property belonging to said *Aaron Druly*, but for a long time wilfully neglected to advertise and sell, whereby, the property levied on being, during said delay, wasted and removed beyond the reach of the officer, said officer was compelled to, and did, afterwards, levy upon, and make the money on the execution out of, the property of the relator, *McCullough*.

May Term,
1852.
THE STATE
v.
DRULY.

Demurrer to the declaration sustained, and final judgment rendered for the defendants.

By our statute a joint execution issues against the judgment-debtor and the replevin-bail. R. S. p. 901, s. 227. But by section 228, on the page just cited, it is enacted that—

“When an execution shall be issued by a justice of the peace, on any judgment against a judgment-debtor, and his surety or replevin-bail, the justice issuing the same shall make an indorsement thereon, designating which of the defendants is the principal and which the surety or replevin-bail; and the constable executing such writ, shall first sell so much of the goods and chattels of the principal defendant named in such execution as he may be able to find, before he shall sell any of the goods and chattels of such surety or replevin-bail, unless he shall be otherwise directed by such surety or replevin-bail.”

We presume that the execution to *Morton* in the present case was a legal one, having upon it the proper indorsements. He should have used reasonable diligence, therefore, to make the money on it out of the property of the principal defendant in said execution; and his failure to do so was a breach of duty, rendering him and his sureties liable to an action on his bond at the suit of an injured party; for said bond was conditional that he should faithfully perform all his duties as constable; and the statute enacts that for any failure so to perform them any injured party may sue. R. S. 692, s. 132.

The suit is to be in the name of the state on the relation of the person aggrieved. According to the allegations in the assignment of the first breach in the declara-

May Term,
1852.

THE STATE
v.
DRULY.

tion in this suit, *McCullough*, the relator, was injured by the alleged neglect of the constable, as it subjected him to the payment of *Druly's* debt. The first breach in the declaration is, therefore, well assigned.

As to the second breach, it is insisted that it is bad, because the delinquency in the officer complained of could not injure the replevin-bail to the judgment before the justice, the relator in this suit. It is said that when the constable had levied on a sufficiency of goods, the property of the principal judgment-debtor, to satisfy the execution, the debt, as to all the execution-defendants, was satisfied, and they discharged from liability. We admit, for the purposes of this case, this latter assertion to be true. See *Starr et al. v. Moore et al.*, 3 McLean, 354. But it further appears that after said constable had levied on a sufficiency of the goods of the principal debtor to satisfy the execution, and wasted them, he proceeded to levy upon, and make the money demanded out of, the property of the bail. This was a wrongful act; and the question is, are the sureties of the constable responsible for it? Our statute enacts that every official bond, &c., shall be obligatory upon the principal and sureties therein, for the benefit of "any and all persons who may be injured or aggrieved by the misfeasance, malfeasance, nonfeasance, or default of such officer in his official capacity." R. S. p. 110, s. 96; p. 691, s. 131. Was the levy in this case, then, upon the goods of the bail made by the officer in his official capacity? We think it was. It is true the act was one of malfeasance which might have been resisted and prevented by the bail. He might have moved the setting aside of the levy and execution; but it seems that he was not bound to do so. The rule on this point is, that if the act done by the officer is performed under color of his office, his sureties are responsible. The case of the *Commonwealth v. Cole et al.*, 7 B. Mon. 250, was this: A constable, without having an execution in his hands against the individual, represented to him that he had, and obtained money from him. There was, at the time, a judgment against said individual on the docket of

a magistrate. The Court said: "Conceding, as we are disposed to do, that this clause of the condition [the condition of the official bond previously set out in the opinion] should receive a most liberal construction for the protection of the community against fraud, extortion, and every form of oppression incident to an abuse of the official character and powers of a constable, still there must be some reasonable limits to its operation. It cannot cover all acts which the individual may do while he holds the office of constable, nor even all acts which in their nature pertain to the office, and might, under proper circumstances, be rightfully done by a constable. The act must not only be of this nature, but it must at least be done by him as constable, under claim of a right to do the act by virtue of his office. And so far as it implies acquiescence or co-operation in the party injured, this acquiescence, or co-operation, should be induced by a confidence in the official character and right as asserted." The Court held that the obtaining of the money without an execution in his hands, by the false pretense that he had one, could not be regarded as an act done under color of office by the constable, and that his sureties were not liable. But the principles laid down in the case will justify a decision against the sureties in the cause now before us. *The City of Lowell v. Parker et al.*, 10 Met. 309, is more directly in point. In that case a constable seized the goods of one *Bean* upon a writ against him appearing on its face to be illegal. *The City of Lowell*, to which, by law, the bond of the constable was given, thereupon, on the relation of *Bean*, brought suit on said bond against the constable and his sureties, and recovered. The Court said: "It is objected in the present case, that the sureties are not liable, because the constable undertook to make an attachment on a writ, in which the *ad damnum* exceeded 70 dollars, and which, therefore, he had no authority to serve. But we think the objection cannot be sustained. He was an officer, had authority to attach goods on mesne process on a suitable writ, professed to have such process, and thereupon took the plain-

May Term,
1852.

THE STATE
v.
DAULY.

May Term,
1852.

WORK
v.
DOYLE.

tiff's goods, that is, the goods of *Bean*, for whose use and benefit this action is brought, and who, therefore, may be called the plaintiff. He therefore took the goods *colore officii*, and though he had no sufficient warrant for taking them, yet he is responsible to third persons, because such taking was a breach of his official duty."

So in the case before us. The constable was an officer authorized to levy executions. He had one in his hands against the relator, which, perhaps, did not warrant him, at that time, in seizing property; nevertheless, by virtue of it, he assumed to do it as constable, in violation of his duty, and his sureties are liable for the act. The second breach is well assigned.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

O. P. Morton, for the plaintiff.

J. Perry, for the defendant.

WORK and Others v. DOYLE and Others.

Where the subject-matter of a bill against husband and wife relates to the inheritance of the wife, a decree against both upon the answer of the husband on behalf of himself and the wife confessing the bill, is erroneous.

It is error to render a decree by default, in such a case, against a married woman.

Monday,
June 14.

ERROR to the *Tippccanoe* Circuit Court.

PERKINS, J.—*Reynolds* and others, the assignees of a mortgage, brought a bill of foreclosure against the heirs of the mortgagor, *Simon P. Doyle*, deceased. Three of the heirs, viz., *Hester Work*, formerly *Hester Doyle*, *Betsy Jackson*, formerly *Betsy Doyle*, and *Louisa J. Reynolds*, formerly *Louisa J. Doyle*, were married women. The bill contained the following among other allegations: "Your orators further show that there is a mistake in the said indenture of mortgage in the description of said mortgaged lands; that instead of the west fraction of the

north-east quarter of section two as written in said mortgage, the parties to the said mortgage meant and intended the north fraction of the north-east quarter of the same section." The husbands of two of said heirs answered for themselves and in behalf of their wives respectively. There was no answer by one of them, viz., *Louisa J. Reynolds*, nor was there by her husband.

May Term,
1852.

WORK
v.
DOYLE.

The Court decreed that so much of said bill as was not denied by the answers should be taken as confessed against the defendants.

There was no proof as to the alleged mistake in the mortgage, nor was there as to some other of the material allegations in the bill.

The Court ordered said alleged mistake to be corrected, and rendered a final decree of foreclosure and for the sale of the land against all the defendants.

In Dan. Ch. Pl. and Pr., Perk. ed., vol. 1, p. 197, it is said:

"Where a *baron* and *feme* are made defendants to a suit relating to personal property belonging to the *feme*, and they put in a joint answer, such answer may be read against them for the purpose of fixing them with the admissions contained in it; but where the subject-matter relates to the inheritance of the wife, it cannot; and the facts relied upon must be proved against them by other evidence."

The latter of these two rules was applied by this Court, in *Comly and Wife v. Hendricks*, 8 Blackf. 189, which was a suit to foreclose a mortgage.

The Court below erred, therefore, in rendering a decree without proof of the material allegations in the bill.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

J. Pettit, *S. A. Huff*, *R. C. Gregory*, and *R. Jones*, for the plaintiffs.

Z. Baird and *J. E. McDonald*, for the defendants.

May Term,
1852.

3	438
145	508
3	438
156	249
156	250
3a	438
165	484

MOON
v.
THE STATE.

MOON v. THE STATE.

Upon the trial of an indictment for murder in the first degree, the jury found a verdict as follows: "We, the jury, find the defendant guilty of manslaughter, and sentence him to imprisonment in the state prison for three years at hard labor." *Held*, that the verdict was not defective in omitting to specify that the defendant was found guilty "as charged in the indictment."

•
Friday,
August 27.

ERROR to the *Marion* Circuit Court.

PERKINS, J.—Indictment against *Harvey Moon*, containing a single count charging murder in the first degree. Trial. Verdict as follows: "We, the jury, find the defendant guilty of manslaughter, and sentence him to imprisonment in the state prison for three years at hard labor." Motions in arrest of judgment and for a new trial overruled, and judgment and sentence upon the verdict.

It was competent for the jury to find the defendant guilty of manslaughter upon an indictment for murder; and the simple finding of guilty of manslaughter was equivalent to a finding of not guilty of murder. So far, the verdict is not objected to. But it is contended that it is fatally defective in not finding the defendant guilty "as charged in the indictment;" and *Wills v. The State*, 4 Blackf. 457, is cited as in point. A general verdict of guilty as charged in the indictment would have been bad in this case for uncertainty; because an indictment for murder in the first degree is really an indictment for one of three distinct crimes, viz., murder in the first, murder in the second degree, and manslaughter. And upon a general verdict of guilty, the Court could not know of what offense the defendant was convicted.

But in this case the jury designate the particular offense of which they find the accused guilty, viz., manslaughter, one of the offenses covered by the indictment; and we think the verdict sufficiently certain. We think the manslaughter of which the jury find the defendant guilty is that covered by the charge in the indictment. The issue which they were sworn to try was upon that charge, the evidence must have been relevant to that

charge, and the instructions of the Court, as well as the arguments of counsel, must have informed them that unless that charge was proved, as to the offense and jurisdiction in which it was prosecuted, they could not find the defendant guilty; and had it not been so proved, in the opinion of the Court below, a new trial would have been granted. If this decision conflicts with the case of *Wills v. The State*, which it probably does, we can only say we are unwilling to follow that case.

Per Curiam.—The judgment is affirmed with costs.

O. H. Smith and *D. Kilgore*, for the plaintiff.

J. S. Buckles and *R. A. Riley*, for the state.

May Term,
1852.

MOON
V.
THE STATE.

END OF MAY TERM, 1852.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1852, IN THE THIRTY-SIXTH YEAR OF THE STATE.

DOE on the Demise of CLENDENNING and Others v. LANIUS
and Another, Executors.

3	441
147	428
36	441
162	325

A naked power or direction given by a will to an executor to sell land for the purpose of paying legacies or making distribution, does not vest in him any title to the land.

The legal estate, in such case, is divested when the executor executes his trust, but, in the meantime, until a sale is made, it is in the heir, who is entitled to the profits.

To cut off the heir at law, the estate must be devised expressly, or by implication, to some other person.

ERROR to the *Franklin* Circuit Court.

SMITH, J.—Ejectment by the heirs at law of *Nixon Oliver*, against his executors. The action was commenced on the 6th of *October*, 1849, and resulted in a judgment for the plaintiff.

Monday,
November 22.

The cause was submitted to the Court, without a jury, upon an agreed statement of the facts.

By that statement, it appears that *Nixon Oliver* died, leaving a will, which was admitted to probate on the 5th

Nov. Term,
1852.

DOE
v.
LANIUS.

of *March*, 1849. The will commences in the following words:

"As to such goods as Almighty God has blessed me with, I devise and bequeath as follows, viz.: I desire and will that the hereinafter described parcel of land shall, within one year after my decease, be sold for cash payments by my executors, that I may the better carry out my purposes and designs, namely, all the land owned by me north of the turnpike road, situated in the county of *Franklin*, and state of *Indiana*, and known and described as follows: (here follows a description of a part of the south-east quarter of section No. 20, &c., by metes and bounds, containing 110 acres.) The above-described premises, when sold and converted into cash as already provided for, I desire and will to dispose of in the following way and manner, viz.: I will and bequeath to my half-brother *William Oliver's* son, *John Oliver*, 300 dollars; to my half sister, *Mary Ann Oliver*, 100 dollars; (here follow bequests to several other relatives of different sums of money,) each and all of the above-named persons being now in *Ireland*. I give and bequeath to *Mary Cooney*, now in *America*, near *Adamsville, Ohio*, 100 dollars. I also desire and will that should the above-described tract or parcel of land sell for more than the several gifts above-mentioned, together with the expenses of my funeral, the furnishing a suitable tombstone, and the expenses of settling up my estate, then, and in that case, all the above-named persons, both in *Ireland* and *America*, shall, in proportion to their several amounts, receive the residue, be it little or much."

The will then directs that all the lands of the testator situated south of said turnpike, shall be sold by his executors to pay legacies to certain relatives residing in the *United States*.

The defendants in this suit were appointed executors by the will, and they were duly qualified. The lessors of the plaintiff are the heirs at law of the testator residing in the *United States*.

The main question in the case is, whether, by the terms

of the will, a right to the possession of the premises in controversy, they being the land owned by the testator north of the turnpike road, was given to the executors.

Nov. Term,
1852.

DON
V.
LANIUS.

We think it is well settled by the current of *American* as well as of *English* decisions, that a mere direction to an executor to sell lands for the purpose of paying legacies or making distribution, does not vest any title to the land in the executor. To cut off the heir at law, the estate must be devised expressly, or by implication, to some other person (1). This question was discussed at considerable length, and numerous cases are cited in the case of *Jackson v. Schaubert*, 7 Cow. 187, in the Supreme Court of *New York*, and also in the same case in the Court of Errors of that state. 2 Wend. 1 (2).

There are cases in which, because the general objects of the will could not be otherwise carried into effect, the Courts have sought out particular expressions in the will for the purpose of enabling them to give the estate to the executor by implication; but where there is merely a naked power to sell the estate and distribute the proceeds, it is not necessary that the executor should have the title to the estate to enable him fully to carry into effect the intentions of the testator. In that case, the legal estate will be divested the moment the executor executes his trust, but, in the meantime, and until a sale is made, the heir is entitled to the profits.

In the will given in evidence in the present case, there is no express devise of the land in controversy to any person, and as a devise to the executors cannot be implied from the necessity of such a devise to give effect to the intentions of the testator, the legal title descended to the heirs at law, and they were entitled to retain possession until the powers given to the executors were executed.

Per Curiam.—The judgment is affirmed, with costs.

J. D. Howland and *J. Ryman*, for the plaintiff.

G. Holland, for the defendants.

(1) See *McIntire v. Cross*, *post*, p. 444.

(2) Mr. *Sugden*, in his *Treatise on Powers*, states the law thus: A devise of land to executors to sell, passes the interest in it, but a devise that exe-

Nov. Term,
1852.

McINTIRE
v.
CROSS.

cutors shall sell the land, or that lands shall be sold by the executors, gives them but a power. And it seems that even a devise of land by a testator to be sold by his executors, without words giving the estate to them, will invest them with a power only, and not give them an interest. 1 Sugden on Powers, 129, 132.—See, also, 4 Kent's Comm. 320.—*Marsh v. Wheeler*, 2 Edw. Ch. 156.—*Bradshaw v. Ellis*, 2 Dev. and Bat. Ch. 20.—*Hope v. Johnson*, 2 Yerg. 123.—*Jameson v. Smith*, 4 Bibb, 307.

McINTIRE and Others v. Cross and Others.

The course of the descent of an estate to the heirs at law can only be interrupted by a devise to some other person, whatever may have been the intention of the ancestor.

Monday,
November 22.

ERROR to the *Jefferson* Circuit Court.

SMITH, J.—This suit was commenced by a petition for partition. The petition alleges that *John McIntire* died intestate, in *May*, 1850, seized of certain lands which are described, and leaving the petitioners, who are his grandchildren, and other children and grand-children who are made defendants, his heirs at law.

Several pleas were filed, the first of which was pleaded jointly by all the defendants.

The record shows that an order of partition was made, to which all the parties consented, waiving all errors except such as may have been made by the Court, if any, in sustaining a demurrer to the first plea, but retaining the right to appeal or bring the case up to this Court by writ of error, so far as the said first plea is concerned.

That plea avers that the said *John McIntire*, before his death, made and published a will, which was afterwards duly proved, and is in the following words:

"State of *Indiana*, *Jefferson* county, ss. Whereas I, *John McIntire*, of the county aforesaid, with *Eliza McIntire*, my wife, by deed dated the 1st day of *January*, 1835, and which is recorded in the recorder's office of said county, in deed-book, pages 21 and 22, did grant and con-

vey to *John McIntire Cross, Truman Hamilton Cross, Edward Cross, and Samuel Taylor Cross*, children of *Samuel T. Cross* and *Emily Cross*, deceased, formerly *Emily McIntire*, my daughter, the following piece or parcel of land situate, lying, and being in the county aforesaid, being 55 acres, more or less, part of the south-west quarter of section 34, in township 4, in range 10, which is more particularly described and set forth in said deed, for and in consideration of the natural love and affection which I bore towards said children as the children of my daughter, and for no other consideration whatever, and with the intention of advancing said children the proportion of my estate which I intended they should have as heirs or distributees of my estate after my decease, and in lieu of every such right or claim; now I, the said *John McIntire*, being desirous more fully, completely, and certainly, to secure and convey into full effect my said intention, and the true intent and object of the said deed of conveyance, and to prevent and silence all further claims on the part of said children, or any of them, or any person claiming through or by them, or any of them, to any part of the estate, real or personal, which I may die possessed of, or have a right to in any way whatever, and to avoid all litigation about the same, do, as to this, make, ordain, and publish the following as my last will and testament—that is to say: That the said *John McIntire Cross, Truman Hamilton Cross, Edward Cross, and Samuel Taylor Cross*, children of my late daughter, *Emily Cross*, as aforesaid, nor their heirs or legal representatives, nor any of them, nor any other person or persons who may claim by or through any of them, are to, nor shall any or either of them have or inherit any further or other part or portion of the real or personal estate, of whatever name or nature it may be, which I may leave at the time of my decease, but that the property deeded to them as before-mentioned, in manner and form as therein expressed, shall be taken and considered as their full share of all my estate, both real and personal, of every kind and description, which they might otherwise have a claim to, as the children of my

Nov. Term,
1852.

MCINTIRE
v.
CROSS.

Nov. Term,
1852.

McINTIRE
v.
Cross.

said daughter, *Emily*, after my decease. In witness whereof," &c.

The question now presented to us for decision is, whether the petitioners, who are the children of *Emily Cross* mentioned in this will, are barred by the will from setting up a claim to have partition of the real estate of the said *John McIntire*, deceased, as heirs at law.

It is very clear that the will was made with the express intention of preventing them from setting up such a claim, if we can ascertain the intentions of the deceased from that instrument. Certainly such an intention could not well be expressed in stronger language. But it is equally clear as a point of law, that the course of the descent of an estate to the heirs at law can only be interrupted by a devise to some other person, whatever may have been the intentions of the ancestor. See *Clendenning v. Oliver's* executors, at this term (1).

Here there is no devise to any person, nor is there any person mentioned in the will in whose favor a devise by implication can by any possibility be construed. That instrument, therefore, can only be regarded as a written statement of the intentions of the maker, that the petitioners should have no other portion of the estate than that which he had before given to them, and it can have no greater force than any other statement which he might have made during his lifetime to the same effect. He professes to make a will, but in fact does not, for he suffers all his estates to descend according to the law of descents, which he should not have done if he desired to make a different disposition of them.

We think, therefore, the demurrer to the plea was correctly sustained.

Per Curiam.—The judgment is affirmed with costs.

J. D. Bright and *J. W. Chapman*, for the plaintiffs.

J. G. Marshall, for the defendants.

(1) See *ante*, p. 441.

THE STATE v. VIRT.

Nov. Term,
1852.THE STATE
v.
VIRT.

Section 121 of the general road law of 1849, which provides a remedy by action of debt at the suit of the supervisor for the obstructing of a public highway, does not take away the remedy by indictment authorized by s. 65, c. 53, R. S. 1843, for the same offense, but furnishes a cumulative remedy.

ERROR to the *Monroe* Circuit Court.

Monday,
November 22.

PERKINS, J.—Indictment for a nuisance created by obstructing a public highway. Indictment quashed, on the ground that a later statute than that upon which the indictment is based, inflicts a penalty for the offense recoverable at the suit of the road-supervisor, before a justice of the peace. The indictment is grounded on the 65th section of the chapter on crimes and punishments. R. S. 1843, p. 974. The subsequent act, inflicting a penalty, was passed in 1849. Acts 1849, p. 116, s. 121.

We think this latter act furnishes a cumulative remedy, and that either it or the former one may be pursued.

In a note to *Sturgeon v. The State*, 1 Blackf. 39, it is said, "Where a statute makes unlawful that which was lawful before, and appoints a specific remedy, that remedy must be pursued and no other; but if the offense were before punishable at common law, then the particular remedy given by the statute is cumulative, and, in such case, either the statutory or common-law remedy may be pursued."

We think the general provision in our act relative to crimes and punishments stands in the place of the common law in this particular. *Kent*, in his Commentaries, vol. 1, p. 467; (8 ed.), says: "The proper inquiry in such cases is, was the doing of the thing for which the penalty is inflicted, lawful or unlawful, before the passing of the statute? If it was no offense before, the party offending is liable to the penalty and to nothing else."

In this case, the doing of the thing, that is, the obstructing of the highway, was unlawful before the passing of the statute inflicting the penalty; and hence, of course, the statute inflicting the penalty did not create the of-

May Term,
1852.

THE STATE
v.
CATTRON.

fense; but, say the books, it is where the statute "creates the offense" and points out a specific remedy, that that remedy must be pursued. This is the general rule, and we see nothing in the case before us indicating an intention on the part of the legislature to make an exception to that rule.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. M. Franklin, J. L. Ketcham, and N. B. Taylor, for the state.

THE STATE v. BURGER.—In Error.

Monday,
November 22.

THE judgment in this case is reversed, with costs, for reasons given in the case of *The State v. Virt*, at the present term (1). Cause remanded, &c.

W. M. Franklin, J. L. Ketcham, and N. B. Taylor, for the state.

(1) See *ante*, p. 447.

THE STATE v. CATTRON.—In Error.

Monday,
November 22.

THE judgment in this case is reversed, with costs, for reasons given in the case of *The State v. Virt*, at the present term (1). Cause remanded, &c.

W. M. Franklin, J. L. Ketcham, and N. B. Taylor, for the state.

(1) See *ante*, p. 447.

THE STATE v. MORRIS.—In Error.

Nov. Term,
1852.MAY
v.
JOHNSON.Monday,
November 22.

THE judgment in this case is reversed, with costs, and the cause remanded for reasons given in the case of *The State v. Virt*, at the present term (1).

W. M. Franklin, J. L. Ketcham, and N. B. Taylor, for the state.

(1) See *ante*, p. 447.

THE STATE v. JONES.—In Error.

THE judgment in this case is reversed, with costs, for reasons given in the case of *The State v. Virt*, at the present term (1). Cause remanded, &c. Monday, November 22.

W. M. Franklin, J. L. Ketcham, and N. B. Taylor, for the state.

(1) See *ante*, p. 447.

MAY v. JOHNSON and Another.

A person who has executed to a constable a bond for the delivery of property levied upon execution, will be estopped, in trespass against the officer for the seizure of the property, from denying that the judgment and execution were against himself, if the bond was procured without fraud.

Such a bond will not be held to have been fraudulently procured, from the fact of previous misrepresentations by the constable of the obligor's liability thereon, and its not being read or explained to him, it not appearing that the obligor was an illiterate person or that he had not the means in his power of knowing the truth.

ERROR to the *Monroe* Circuit Court.

PERKINS, J.—Trespass for forcibly seizing and carrying.

Monday,
November 22.

Nov. Term,
1852.

MAY
v.
JOHNSON.

away the goods of *Solomon May*, the plaintiff. Plea, by way of estoppel, that said plaintiff, on, &c., at, &c., by his certain delivery-bond, admitted that, on, &c., the said *Hardesty*, one of the defendants, then and there being a constable, &c., levied on the goods described in the declaration by virtue of an execution issued, &c., and directed to said *Hardesty*, on a judgment rendered against said plaintiff and in favor of said *Johnson*, the other of the defendants, for the sum of, &c., which is the identical taking complained of, &c.

Replication, that the plaintiff ought not to be estopped, &c., because, he says, that just before the supposed execution of said bond, the said *Hardesty* was informed that the judgment and execution obtained by said *Johnson* were not against the plaintiff in this suit but against another person of a like name, often called "*Little Sol.*," whereupon said *Hardesty* informed said plaintiff that if such was the fact, nothing further would be done in the matter, but he must give a delivery-bond for the property or it would be seized and taken away; and the said plaintiff, trusting to the representations of said *Hardesty*, without the delivery-bond being read or explained to him, signed the same, &c.

Demurrer to this replication sustained, and final judgment rendered for the defendants.

The first inquiry will be as to the validity of the replication. It sets up facts showing, as is claimed, fraud in the procurement of the delivery-bond. We do not think fraud is shown. If the plaintiff had been, in the language of judge *Sullivan* in *Sceright v. Fletcher*, 6 Blackf. 380, "an illiterate man, and the bond had been misread to him, he not being able to detect the imposition, the case would have been different. But it appears that he signed the bond without reading it himself, or hearing it read, and, with all the means of knowing the truth in his power, reposed a blind confidence in representations not calculated to deceive a man of ordinary prudence and circumspection. In such a case, the law affords no relief. 2 Stark. Ev. 374." In the present case it was not neces-

sary that the plaintiff should have given a delivery-bond; for, had the officer illegally deprived him of the possession of his property, the law would have afforded ample redress in damages.

Nov. Term,
1852.
THE STATE
v.
CLARK.

The question next arises upon the plea, (for the demurrer reaches it,) whether that admission estops the obligor in the bond from controverting, in this suit, the existence of the judgment and execution against himself. This suit is between the parties interested in that bond, and in relation to the subject-matter of it. In a suit upon the bond against the obligor for a failure to deliver the property according to the condition, the admission in question would have estopped the obligor from denying it, there being no fraud; and we think said admission as effectual an estoppel in this, as it would be in such a suit. See *Trimble v. The State*, 4 Blackf. 435.

Per Curiam.—The judgment is affirmed with costs.

J. S. Watts, J. L. Ketcham, and N. B. Taylor, for the plaintiff.

C. Dewey, for the defendants.

THE STATE v. CLARK.

The charge in an indictment was as follows: That the defendant, on, &c., at, &c., unlawfully sold to one *J. W.* a quantity of *spiritual* liquors by retail, less than a quart, to-wit, one half-pint of *spirituous* liquor, for five cents in money, he, the defendant, not being licensed to vend *spiritual* liquors by retail; contrary, &c. Held, that the indictment was not bad for using the word *spiritual* instead of *spirituous*.

ERROR to the *Boone* Circuit Court.

BLACKFORD, J.—This was an indictment, which, on the defendant's motion, was quashed by the Circuit Court.

Monday,
November 22.

The charge in the indictment is as follows: That the defendant, on, &c., at, &c., unlawfully sold to one *James Wysoong* a quantity of *spiritual* liquors by retail, less than

Nov. Term,
1852.

HAMILTON
v.
THE STATE.

a quart, to-wit, one half-pint of *spirituous* liquors for five cents in money, he, the defendant, not being licensed to vend *spiritual* liquors by retail; contrary to the statute, &c.

The only objection made to the indictment is, the use in it of the word *spiritual* instead of *spirituous*. That the grand jury, by the words *spiritual* liquors, meant *spirituous* liquors, there can be no doubt. The indictment, indeed, expressly says so; for, after charging the unlawful sale of *spiritual* liquors, it says, to-wit, one half-pint of *spirituous* liquors, &c. It has been held that an indictment charging that the defendant did feloniously *stal*, take, and carry away one watch, &c., was not bad merely because the word *stal* was used instead of the word *steal*. *Wills v. The State*, 4 Blackf, 457.

We think the objection made to the present indictment should have been overruled.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. J. Boone, for the state. -

HAMILTON, Auditor of *Marion* county, v. THE STATE, on the Relation of BATES.

By the statute of 1852, the members of the state board of equalization were appointed to discharge a public duty, and there being no provision that a less number than the whole should proceed in the business, the district delegates and the state auditor who convened at *Indianapolis* as such board, had no authority to act in the absence of the delegate from the sixth district.

Were the order of said board increasing the appraisement of land in *Marion* county otherwise valid, it would be null and void, because it was made in the absence of one of the members of the board.

Said board is a mere creature of the statute, and has no authority except what the statute confers; and the board being only authorized by the statute to equalize the appraisement of land *between the several congressional districts*, the order of the board for equalizing the appraisement between

3	452
148	564
151	410
8	452
156	4
8	452
4157	200

30	452
160	227
30	452
162	577

the several counties of the sixth congressional district, had the board been legally convened, would have been null and void on that account.

The writ of *mandamus* is the proper remedy for the state to compel an officer to perform a public duty.

A *mandamus* to compel a county auditor to issue his duplicate for the tax on real property without adding to the valuation thereof an illegal *per cent.*, is a case for the enforcement not of a private but a public duty.

The relator, in an application for a *mandamus* for the enforcement of a public right, need not have a special interest in the matter, nor be a public officer, but any private citizen, having a general interest in the matter, may be a relator.

Nov. Term,
1852.

HAMILTON
v.
THE STATE.

APPEAL from the *Marion* Circuit Court.

Monday,
November 22.

BLACKFORD, J.—An alternative *mandamus* in the name of *The State*, on the relation of *Hervey Bates*, was issued by the *Marion* Circuit Court on the 21st of *July*, 1852. The writ was issued on the affidavit of the relator, and was directed to *John W. Hamilton*, auditor of said county.

The relator's affidavit, which is recited in the writ, states, *inter alia*, that, on the 5th of *July*, 1852, the auditor of state and the delegates from the several congressional districts of the state (except the delegate from the sixth district), met at *Indianapolis* for the purpose of equalizing the valuation of the real property of each of said districts; that the sixth district is composed of the counties of *Marion*, *Hancock*, *Shelby*, *Johnson*, *Morgan*, and *Hendricks*; that such state board of equalization continued in session until the 9th of said month, and resolved that there should be an addition of fifteen *per cent.* to the real estate of said county of *Marion*; an addition of ten *per cent.* on such estate in said *Shelby* county; and an addition of five *per cent.* on such estate in said *Hancock* county; that no other action was taken by said state board as to any of the counties in said sixth district; that on the 17th of said month the auditor of state reported to said auditor of *Marion* county, the said per centage of increase to be added to the valuation of real property therein; that neither at the first, nor at any other meeting of said state board, was there any delegate present from said sixth district, though one had been regularly appointed; that said relator is a citizen and tax-payer of said

Nov. Term, *Marion* county, and has real estate therein appraised at
 1852. 49,875 dollars for the purpose of taxation the present
 year; that said county auditor is about to add said fifteen
 HAMILTON
 v.
 THE STATE. *per cent.* to the valuation of the land in *Marion* county,
 and refuses to certify the duplicate without said addition.

The writ commanded said county auditor to issue the duplicate for the tax on real property without said addition of fifteen *per cent.*, or show cause why he had not done so.

Afterwards, on the 27th of said month, said county auditor filed his return to the writ. This return states that the defendant cannot deny the facts alleged in the writ
 • and the relator's affidavit, and admits the same to be true, but that he denies the relator's right to require him to omit the said fifteen *per cent.* reported to him by the state auditor. The return further states that the defendant, in order to have a speedy decision, expressly waives all objection to the form of remedy, and all questions of a technical character, desiring the Court to decide directly whether said fifteen *per cent.* shall or shall not be added pursuant to the state auditor's report; that he waives all other questions, and admits all facts necessary to the decision of the main question.

The cause was submitted to the Circuit Court on said affidavit, writ, and return.

The Court ordered a peremptory *mandamus* to issue, commanding the defendant, as county auditor aforesaid, to issue said duplicate without the addition of said fifteen *per cent.*, so far as related to the real estate of the relator.

The first question presented by this case is, whether the district delegates and the state auditor, who convened as aforesaid at *Indianapolis* as a state board of equalization, had any authority to act as such board in the absence of the delegate appointed for the sixth district?

The law on this subject is stated by Chancellor *Kent* in the following words: "If the authority, in a matter of mere private concern, be confided to more than one agent, it is requisite that all join in the execution of the power,

and they are jointly responsible for each other; though the cases admit the rule to be different in a matter of public trust, or of power conferred for public purposes; and if all meet in the latter case, the act of the majority will bind." 2 Kent's Comm. 633. The Supreme Court of *New York*, in speaking on the same subject, says: "The rule seems to be well established that, in the exercise of a public as well as private authority, whether it be ministerial or judicial, *all* the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed. Where the authority is public, and the number is such as to admit of a majority, that will bind the minority, after all have duly met and conferred." *Downing v. Rugar*, 21 Wend. 182. The section of the statute of 1852, applicable to this part of the case, is as follows: "A state board of equalization, to consist of the delegates from the district boards mentioned in the next preceding section, together with the auditor of state, who shall be the president of the state board, shall meet at *Indianapolis* on the first *Monday* in *July* next succeeding the meetings of the said district boards; such state board shall diligently and carefully examine and compare the valuations of real property as reported to them by the chairman of the district boards, with the corrections and changes made therein by the district boards; and it shall be the duty of the said state board of equalization to equalize the appraisement of the lands in this state *between the several congressional districts*, in conformity to the standards of value and other provisions herein prescribed in relation to the county and district boards of equalization."

According to this law, the members of said state board are appointed to discharge a public duty; and there is no provision that a less number than the whole should proceed in the business. The consequence is, according to the above-cited authorities, that, were the order of said state board increasing the appraisement of the land in *Marion* county, otherwise valid, it would be null and void, because it was made in the absence of one of the mem-

Nov. Term,
1852.

HAMILTON
v.
THE STATE.

Nov. Term,
1852.

HAMILTON
v.

THE STATE.

bers of the board. This doctrine is not new in this Court. We have heretofore recognized it in the case of *Harrison v. Stipp*, 8 Blackf. 455.

The next question raised is, whether, assuming the state board to have been legally convened, the said order can be sustained? That order is for equalizing the appraisements, not between the several congressional districts, but between the several counties in one of those districts.

The duty of the state board is prescribed by the section of the statute already referred to. The following is the language: "Such state board shall diligently and carefully examine and compare the valuations of real property as reported to them by the chairmen of the district boards; and it shall be the duty of the said board of equalization to equalize the appraisements of the lands in this state *between the several congressional districts*, in conformity to the standard of value and other provisions herein prescribed in relation to the county and district boards of equalization." So, by the express terms of this law, the appraisements of the lands in the state are to be equalized by the state board *between the several congressional districts*. Each county board equalizes the appraisements between the townships of the county; each district board, the appraisements between the counties of the district; and the state board, the appraisements between the districts. The statute, however, has the following additional clause relative to the county boards, namely: "Such (county) board shall not be confined to an equalization of values between the several townships; but whenever they shall become satisfied, either from the application of owners of land who may be aggrieved by the appraisement or by other means, that the valuation of lands within any township has been unequal and inequitable, they shall have power to equalize such valuation, in conformity to the provisions of the third section." It is clear that, without this last-mentioned provision, the power of the county boards to equalize appraisements would have been confined to the appraisements between their respective townships.

There is not, in the statute which makes it the duty of the state board to equalize the appraisements between the districts, any additional clause giving that board power to equalize any other appraisements, and, consequently, it can equalize no others. The state board, like the county and district boards, is a mere creature of the statute, and can exercise no authority but such as the statute confers. It follows, that though the state board should be considered as having been legally convened, the said order for equalizing the appraisements, not between the several congressional districts, but between the counties in one of those districts, must be null and void; the board having no authority to make such order.

Nov. Term,
1852.

HAMILTON
V.
THE STATE.

The 9th section of the statute requires the state auditor, when the state board has adjourned, to give to the proper county auditors the necessary information to enable them to make the proper changes in their county lists. This, the state auditor will be enabled to do, from the orders of the state board equalizing the appraisements between the districts.

The next question is, whether a *mandamus* is the proper remedy in this case? We have no doubt as to this point. The order of the state board, as we have already shown, for the addition of fifteen *per cent.* to the valuation of the real estate in *Marion* county, is a nullity; it was, consequently, the defendant's duty, as the county auditor, to issue the tax-duplicate without said additional per centage. That duty, which was a public one, the defendant refused to perform; and the proper remedy for the state, to compel his performance of it, was by *mandamus*. 3 Blacks. Comm. 110 (1). The order aforesaid of the state board being null and void, the defendant had no discretion relative to the issuing of the duplicate. He was as much bound to issue it without the said addition of fifteen *per cent.*, as he would have been had the order for such addition not been made.

The only remaining question in the cause is, whether, admitting the writ might issue, *Bates* was a proper rela-

Nov. Term,
1852.

HAMILTON
v.
THE STATE.

tor? The objection is that some officer of the state, and not a mere private person should have been the relator.

Were this a case merely for private relief, the relator would have to show some special interest in the subject-matter. But here the case is different. The defendant, who was county auditor, refused to issue the legal duplicate for the collection of the taxes, and a *mandamus* was applied for to compel him to discharge this duty of his office. It is a case for the enforcement, not of a private, but of a public right; and it is not necessary, in such cases, that the relator should have a special interest in the matter, or that he should be a public officer. That the defendant should discharge, correctly, the duties of his office, was a matter in which *Bates*, as a citizen of the county, had a general interest; and that interest was, of itself, sufficient to enable him to obtain the *mandamus* in question, and have his name inserted as the relator. There is a *New York* case in which this subject is fully discussed, and in which it is held that any private citizen may be a relator where, as in the present case, the *mandamus* is in a matter of public right. The *mandamus* in the *New York* case commanded certain commissioners of highways to open a certain public road; and it was held that, in such case, the attorney-general, or any citizen of the state, might be the relator. *The People v. Collins*, 19 Wend. 56.

We are unanimously of opinion, for the reasons above given, that the judgment of the Circuit Court ordering a peremptory *mandamus* to issue in this case is correct.

Per Curiam.—The judgment is affirmed with costs.

J. Morrison, S. Major, J. A. Liston, and J. S. Harvey, for the appellant.

L. Barbour, A. G. Porter, O. H. Smith, and S. Yandes, for the appellee.

(1) The writ of *mandamus* will only issue when there is no other adequate and specific legal remedy.

The party applying for a *mandamus* must make out a legal right; though, if he show such legal right, and there be also a remedy in equity, that is

no answer to the application; for when the Court refuse to grant a *mandamus*, because there is another specific remedy, they mean only a specific remedy at law. *The King v. The Marquis of Stafford*, 3 T. R. 646.—*The People v. The Mayor, &c., of New York*, 10 Wend. 395. The circumstance, however, that redress might be sought in chancery should influence the Court in the exercise of its *discretion* in granting or refusing the writ. 10 Wend. 395.

The fact, also, that the party is liable to indictment and punishment for his omission to do the act, to compel a performance of which the writ is sought, constitutes no objection to the granting of the writ. *Id.*

In relation to the necessity of there being another remedy at law, specific as well as adequate, in order to deprive the party of the remedy by *mandamus*, the following is a recent case in *New York*:

Under the provisions of the act to incorporate the village of *Williamsburgh*, a jury had been summoned by two magistrates to assess the damages sustained by the opening of a street. The jury found their verdict, reduced it to writing, and signed it, but refused to deliver it to the trustees of the village until they should pay them for their services. Upon the application of the trustees, an alternative *mandamus* was issued, directed to the justices and jury, commanding them to proceed and make return of their action in the premises. The justices returned that the inquisition of the jury, after being signed, was delivered to one of the jury to be handed to the trustees. One of the jurors returned that it had been delivered to the justices, but did not state whether it had been returned to the jury, or whether it was in their possession, or not. The other eleven jurors made no return to the *mandamus*.

A motion was made to quash the *mandamus*, on the ground that the trustees had a remedy by an action of replevin against the particular juror, or by a suit against them all for damages; but the Court said:

"To deprive a party of his remedy by *mandamus*, on the ground that he has a remedy by action, the remedy by action must not only be adequate, but it must be specific. The action for damages certainly would not be specific. Whether a replevin would be, or not, depends upon circumstances. For if the inquisition could not be obtained, on the writ of replevin, then the only remedy of the trustees would be in the damages which they might recover. The only specific remedy they can have is by *mandamus*. Therefore the motion is denied." 1 Barbour's S. O. R. 34.

Nov. Term,
1852.

OWENSBY
v.
PLATT.

OWENSBY v. PLATT.

The purchase by a firm of a judgment against one of its members and other persons, the assignment being taken in the name of a member who was not a party to the judgment, is not a satisfaction of the judgment.

Nov. Term,
1852.

OWENSBY
v.
PLATT.

Tuesday,
November 23.

ERROR to the *Dearborn* Circuit Court.

SMITH, J.—This was a motion to have an entry of satisfaction made upon a judgment, which was overruled in the Circuit Court. The facts are substantially these:

A judgment had been rendered in favor of *The State Bank* against *William V. Cheek*, *John F. Cheek*, *Jabez L. Owensby*, *Simeon Vinson*, and *James P. Milliken*. The last-named judgment-defendant, *Milliken*, was a member of a firm composed of himself, *Platt*, and one *Eldridge*. This firm desired to have a bill discounted by the *Lawrenceburgh* branch of the state bank, and upon making application for that purpose they were informed that as *Milliken*, one of the partners, was under protest, they could obtain no further accommodation unless the judgment in favor of the bank should be paid. Thereupon, and to remove this difficulty, it was agreed by the parties that enough of the proceeds of the bill proposed to be discounted should be applied to the purchase of the judgment, and that it should be assigned to *Platt* by the bank. The bill was then discounted and the assignment made accordingly.

Owensby now moved for an entry of satisfaction upon the judgment, upon the ground that it had been paid by one of his co-defendants, and the debt thereby extinguished. This would, no doubt, have been the case, at law, if the assignment had been made to *Milliken*, or, perhaps, even to the firm. See *Cox v. Hodge*, 7 Blackf. 146. The reason would be, that one person cannot be at the same time both plaintiff and defendant, and, therefore, *Milliken*, as the assignee of a judgment in which he was a defendant, could not have sued out execution against himself. But even in that case he would have been entitled to relief in equity, if he was only a surety of the debt upon which the judgment was rendered, or was entitled to contribution from his co-defendants.

In the present case, by the assignment, the legal title to the judgment is in *Platt*, not in one of the judgment-defendants, and the technical difficulty in the way of an

enforcement, above alluded to, does not exist. There was evidently no intention to extinguish the judgment when the assignment was procured, and we think the decision of the Court below should be sustained.

Nov. Term,
1852.

BALLS
v.
HAINES.

Per Curiam.—The judgment is affirmed with costs.

J. Ryman, for the plaintiff.

E. Dumont, for the defendant.

BALLS v. HAINES.

A suit was commenced in the Circuit Court and a judgment obtained in the name of A., without his knowledge or direction, for the benefit of another person, A. having no interest in the subject-matter. A part of the judgment was paid to the attorneys of record, but A. never received any of it. The judgment was afterwards reversed by the Supreme Court, and the cause remanded to the Circuit Court, where it was dismissed. *Held*, in a suit against A. to recover back the money, that he was not liable therefor.

ERROR to the *Tippicanoe* Court of Common Pleas.

Tuesday,
November 23.

SMITH, J.—Assumpsit by the plaintiff in error against the defendant in error upon the common counts. The general issue was pleaded, and the judgment was in favor of the defendant.

The material facts shown by the evidence were as follows:

In *September*, 1836, a writ of *capias ad respondendum* was issued by the clerk of the *Carroll* Circuit Court, in a suit commenced in the name of *Haines* against one *Vail*. *Balls* entered himself special bail for *Vail*, and in *October*, 1836, a judgment was rendered against *Vail* for 584 dollars.

In *November*, 1840, an action was commenced in the same Court, in the name of *Haines*, against *Balls*, upon the liability of the latter as special bail. A judgment was rendered against *Balls* in the following *December*, but

Nov. Term,
1852.

BALLS
v.
HAINES.

this judgment was reversed by the Supreme Court during the year 1845.

Before the last-mentioned judgment was reversed, *Balls* paid 654 dollars to the attorneys who had prosecuted the suit against him, who receipted the judgment and entered it satisfied in *May*, 1842; and after the cause was remanded back to the Circuit Court for a new trial, it was dismissed.

The suit which had been commenced in the name of *Haines* against *Vail*, was on a note made by the latter in favor of *Minor, Coats, and Co.* The defendant, after giving the record of this suit in evidence, proved, by parol testimony, that during the summer of 1836, *Haines* delivered a letter to an attorney at *Lafayette*, addressed to said attorney by *Minor, Coats, and Co.*, inclosing the note and directing the attorney to collect it by legal proceedings. At the time the note was thus received, it had been indorsed by the payees, but whether they had made the special indorsement, or their indorsement was in blank and the name of *Haines* had been written over it by the attorney who brought the suit, the witness who testified to these facts could not recollect.

The suit was, however, commenced and carried on in the name of *Haines* for the sole benefit of the payees of the note. No part of the money collected of *Balls* was paid to *Haines*. The latter had no interest in the note whatever, and the attorney who instituted the suit upon it in his name, had done so without any instructions to that effect. *Haines* had, in fact, no knowledge of either of the suits until after the reversal of the judgment against *Balls* by the Supreme Court.

Upon this state of facts, we think the judgment for the defendant is right. In order to maintain this suit against him, it was necessary for the plaintiff to prove that he had either actually or constructively received money, which, in consideration of law, was held by him for the plaintiff's use. Here it was clearly proved that he did not receive the money paid by *Balls*, or any part of it, and we do not think that he was estopped by the record

from showing to whom it really belonged, and who did receive it. Nov. Term,
1852.

Prima facie, indeed, the money due by a judgment belongs to the plaintiff of record, and when paid would be presumed to have been received by him, but the record cannot be conclusive evidence to that effect. Suits are frequently prosecuted in the name of nominal plaintiffs, who are not permitted to have any control whatever either in the management of the proceedings or of the judgments when rendered. In such cases it would, certainly, be inconsistent with justice to hold them responsible for all the acts done in their name, and without the ability to relieve themselves of such responsibility by showing who really did do the acts complained of.

There is a case in the *New York* reports very similar in many respects to this. A bill in chancery had been filed in the name of *Field*, alleging that he had obtained a judgment against *Boyer*, and a decree was rendered setting aside a conveyance of certain land by *Boyer* to *Magee*, as being fraudulent as against the creditor. Under this decree the land was sold and the proceeds paid over to *Kellogg* and others, to whom the judgment had been assigned, and who had employed a solicitor to conduct the suit in the name of *Field*. This decree was afterwards reversed, and *Magee* then brought an action of assumpsit against *Kellogg* and others to recover the money which had been collected and paid to them from the sale of the property. It was held in this case that the action was rightly brought against the real parties to the former suit, and that the plaintiff was not estopped, by the record of that former suit, from asserting that they were the real parties. *Magee v. Kellogg et al.* 24 Wend. 32.

Per Curiam.—The judgment is affirmed with costs.

Z. Baird and *D. D. Pratt*, for the plaintiff.

D. Mace and *R. Jones*, for the defendant.

• *BALLS*
v.
HAINES.

Nov. Term,
1852.

NEWCASTLE
AND RICHMOND
RAILROAD
COMPANY
v.

PERU AND IN-
DIANAPOLIS
RAILROAD
COMPANY.

THE NEWCASTLE AND RICHMOND RAILROAD COMPANY v. THE
PERU AND INDIANAPOLIS RAILROAD COMPANY.

8 464
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In 1848, the legislature chartered *The Newcastle and Richmond Railroad Company* for the construction of a railroad from *Richmond*, in *Wayne* county, to *Newcastle*, in *Henry* county. In 1851, the legislature amended the charter of the company by authorizing them to extend said road from *Newcastle* to intersect the *Peru and Indianapolis Railroad* or the *Lafayette and Indianapolis Railroad* at such point on said roads as the *Newcastle and Richmond Railroad Company* might select. Held, that the terminus to which the *Newcastle and Richmond Railroad* might be extended under said amendment, was sufficiently fixed, and that the grant of the right to make such extension was not void for the uncertainty of such terminus.

When the legislature authorizes the construction of a railroad between two designated points, no intermediate point being named, and there are routes between said points equally feasible, that which is most direct will be deemed to have been contemplated; but where there is a difference in the feasibility of the routes, a reasonable discretion must be allowed in the selection of that to be followed.

Section 16 of the charter of the *Peru and Indianapolis Railroad Company*, which enacts that when said company shall have procured the right of way through land, either by the voluntary release of the owner or by condemning the same, they shall be seized in fee-simple of the right to such land, and shall have the sole use and occupancy thereof, does not vest in said company the right to the exclusive possession of the land occupied by the road, but vests the fee-simple subject to the right of the state to take the same, upon compensation being made, for the public use.

The clause in said charter immediately following that last cited, is, that "no person, body politic or corporate, shall in any way interfere with, molest, disturb, or injure any of the rights or privileges" thereby "granted, or that would be calculated to detract from or affect the profits of said corporation." Held, that the state did not thereby relinquish the right to charter any other company whose improvement would compete with said *Peru and Indianapolis Railroad*, nor the right to take the franchise of the road for public use; but said clause restrains such other company from committing any unauthorized illegal injuries.

The *Newcastle and Richmond Railroad Company* have a right, under their charter, to have a sufficient quantity of the land over which the *Peru and Indianapolis Railroad* passes condemned for the purposes of their road, and the fee-simple vested in themselves; but this will be subject to the right of way of the *Peru and Indianapolis Railroad Company*.

Tuesday,
November 23.

APPEAL from the *Tipton Circuit Court*.

PERKINS, J.—The *Peru and Indianapolis Railroad Com-*

pany filed a bill in the *Howard Circuit Court* against the *Newcastle and Richmond Railroad Company*, praying an injunction restraining the latter company from constructing their road, &c.

Nov. Term,
1852.

NEWCASTLE
AND RICHMOND
RAILROAD
COMPANY
V.

PERU AND IN-
DIANAPOLIS
RAILROAD
COMPANY.

The bill states that the former company was chartered in 1846; that the 19th section of the charter enacted: "That when said corporation shall have procured the right of way as hereinbefore provided, they shall be seized in fee-simple of the right of such land, and they shall have the sole occupancy and use of the same, but not to interfere with the right of way of any other railroad company heretofore incorporated; and no person, body politic or corporate, shall in any way interfere with, molest, disturb, or injure any of the rights or privileges hereby granted, or that would be calculated to detract from or affect the profits of said corporation."

The bill further states that said company have procured the right of way from *Indianapolis* to *Peru*, have completed twenty-two miles of their road, and are actively engaged in constructing the remainder. It further states that, in 1848, the *Newcastle and Richmond Railroad Company* were incorporated, and that, in 1851, the legislature, by an amendment to the charter, authorized said company to extend their road "from *Newcastle*, in *Henry* county, to intersect the *Peru and Indianapolis Railroad*, or the *Lafayette and Indianapolis Railroad*, at such point on said roads as said *Newcastle and Richmond Railroad Company* may determine upon." The charter of this latter company contains the usual provisions in regard to the mode of assessing damages in procuring the right of way, &c.

The bill further alleges that said *Newcastle and Richmond Railroad Company* have elected to intersect the *Lafayette and Indianapolis Railroad* at *Lafayette*, and are surveying and locating their road to that point; that their route passes the *Peru and Indianapolis railroad* at *Kokomo*, proceeds thence to *Logansport*, a point forty miles north of a direct line from *Newcastle* to *Lafayette*, and thence to the latter place.

Nov. Term,
1852.

NEWCASTLE
AND RICHMOND
RAILROAD
COMPANY
v.

PERU AND IN-
DIANAPOLIS
RAILROAD
COMPANY.

An injunction is prayed and was awarded by the Court below.

It is sought to sustain, in this Court, the injunction granted, mainly on three grounds:

1. That the western terminus of the extension of the *Newcastle and Richmond* railroad not being fixed by law, the grant of the right to make said extension is void. The argument is, that, to construct a railroad, it is necessary to take private property; that private property can be taken forcibly only for public use; that it is in that view only that corporations are ever authorized to take it; and that before a corporation can so take it, in any particular case, it is necessary that the legislature should declare that the public use demands it in that case. In other words, that it is necessary, when the legislature attempts to transfer to a corporation the power to take private property for the construction of a railroad, that the legislature should expressly fix the termini of the road, thereby saying that the public interest requires a road connecting said termini, and that, hence, private property between them may be taken to make it.

We shall not now express an opinion upon the legal proposition assumed in the above argument, but shall limit ourselves to a denial of some of the material facts asserted as the basis of the legal proposition, viz., that the terminus to which the *Newcastle and Richmond* railroad may be extended is not fixed, and, hence, that the public use of the extension has not been declared. We think both these things have been done. A company had been chartered for the construction of a railroad from *Richmond*, on the eastern border of the state, north-westerly to *Newcastle*. Railroads were also in process of construction from *Peru* and from *Lafayette*, on the *Wabash* river, to *Indianapolis*. By extending the *Richmond and Newcastle* railroad to an intersection with either the *Peru* or *Lafayette* railroad, the first above-named road would be connected with an important point on the *Wabash* river and the *Wabash and Erie* canal. Such connection we understand the legislature to have regarded as of public utility and to

have authorized. It was not material to this public utility that the connection mentioned should be made at any particular point on either the *Peru* or *Lafayette* railroad. The public interest would be well subserved by a connection at any point on either, and the choice between the roads, and the particular point for the connection with the one selected, were left to the discretion of the corporation. The only limitation imposed was, that the connection should be by an intersection, that is, by cutting into the road selected. The connection, therefore, must be made at some point south of the northern and north of the southern terminus of the *Lafayette* railroad, that being the one chosen for intersection.

2. It is contended that if the *Richmond* and *Newcastle* company were authorized to extend their road to some point on the *Lafayette* and *Indianapolis* railroad, then they were bound to make the extension in a direct line to that point, and could not deviate from such a line 40 miles north to *Logansport*. When the legislature authorizes the construction of a railroad between two designated points, no intermediate point being named, undoubtedly, where the routes between said fixed points are equally feasible, the most direct would be contemplated. But where there is a difference in the feasibility of routes some reasonable discretion must be allowed in the selection of that to be followed. To how great an extent a deviation from a direct line would be permitted, we are not called upon now to decide, as there is no allegation in the bill in the present case that there is any feasible route between *Newcastle* and the point selected for an intersection of the *Lafayette* and *Indianapolis* railroad, except that chosen by the way of *Logansport*. If there be any such it must be alleged in an amendment to the bill.

3. The third ground insisted on is, that the *Richmond* and *Newcastle* railroad cannot be extended to the *Lafayette* and *Indianapolis* railroad without crossing the *Peru* and *Indianapolis* railroad, and that it cannot cross that road without violating exclusive rights vested in the company constructing said road.

Nov. Term,
1852.

NEWCASTLE
AND RICHMOND
RAILROAD
COMPANY
v.
PERU AND IN-
DIANAPOLIS
RAILROAD
COMPANY.

Nov. Term,
1852.

NEWCASTLE
AND RICHMOND
RAILROAD
COMPANY
V.

PERU AND IN-
DIANAPOLIS
RAILROAD
COMPANY.

1. It is claimed that the *Peru and Indianapolis* railroad company have the exclusive right to the use of the ground over which the track of their road passes; and,

2. That they have the exclusive right of furnishing the facilities for transportation for an indefinite region of country round about their road.

We cannot admit that either of these claims is well grounded. Section 15 of the charter of said company authorizes them to obtain releases of the land along the line of the road; section 16 permits them, where a voluntary release is refused, to have the land condemned in the manner usual in such cases; and section 19 declares "that when said corporation shall have procured the right of way" in either of said modes, "they shall be seized in fee-simple of the right to such land, and they shall have the sole use and occupancy of the same," &c. This latter provision is insisted on as a contract on the part of the state for the exclusive possession by said company of the lands mentioned; but we do not so regard it. We think it simply intended as declaratory of the effect which the releases and condemnations of land spoken of in the 15th and 16th sections should have; that is, whether they should be taken to convey an easement, a right of way merely, or a fee-simple title, and declaring it should be the latter; that they should have the same force that deeds from the proprietors in the usual form to the company, conveying to their sole use, &c., would have, subject of course, as expressly declared in the section, to all previous grants of rights of way, and subject, impliedly of course, as all ordinary grants of land by one person to another, or by the state to a person, are, to the right of the state to take the lands granted, on compensation made, for the public use. If the view taken by the counsel for the *Peru and Indianapolis* railroad company be correct, the state cannot, without the consent of said company, permit the construction of a state or county highway across the track of said railroad. It would require the clearest expression to satisfy us that a legislature had attempted to commit so great a folly.

The clause in the charter upon which the claim to the exclusive right of transportation is rested is as follows:

"And no person, body politic or corporate, shall, in any way, interfere with, molest, disturb, or injure any of the rights or privileges hereby granted, or that would be calculated to detract from or affect the profits of said corporation." This language is taken to be a relinquishment on the part of the state of the right to charter any other company whose improvement would be in competition with the *Peru and Indianapolis* railroad, and also of the right to take the franchise of said railroad company for public use. If such be the force of the language quoted, then the state has deprived herself of the power to charter further companies for the improvement of any portion of her eastern half, for no road can be made extending north, east, or south, in the east half of the state that will not tend to diminish the profits of the *Peru and Indianapolis* railroad. It is not necessary that we should here decide whether the state can deprive herself, by contract with a citizen, of any part of her sovereignty, her right of eminent domain. It is sufficient for this case to say, that she will not be taken to have done it without a very clear expression to that effect. Such an expression has not been made in the charter of the *Peru and Indianapolis* railroad company. The language relied on as evidencing the deprivation is vague and indefinite. But it does not purport to restrain the power of the state in the creation of corporations or otherwise. It assumes, indeed, that others are to exist in the vicinity of the *Peru and Indianapolis* railroad, but restrains such corporations from injuring the company that owns it. This must relate to unauthorized illegal injuries.

One point more is made. It is urged that there is no provision in the *Richmond and Newcastle* railroad charter for making compensation for injury done to the franchise of the *Peru and Indianapolis* railroad company. It is assumed that the crossing of their track by another road will be an injury to their franchise. We do not see how it will be so. We know, as matter of general information, that rail-

Nov. Term,
1852.

NEWCASTLE
AND RICHMOND
RAILROAD
COMPANY
V.
PERU AND IN-
DIANAPOLIS
RAILROAD
COMPANY.

Nov. Term,
1852.

NEWCASTLE
AND RICHMOND
RAILROAD
COMPANY
v.

PERU AND IN-
DIANAPOLIS
RAILROAD
COMPANY.

roads do cross each other in every part of the world where they exist, and that, by observing proper time regulations, they do this without injury or inconvenience to each other.

It is true, the *Newcastle* railroad company are authorized to have the land condemned over which the *Peru* track passes, and have the fee-simple vested in themselves; but this will be held subject to the right of way of the *Peru* and *Indianapolis* railroad company. The franchise of this latter company is not taken away with the fee-simple of the land. But if it were taken or injured, we do not see why damages might not be obtained for it under the general provision in the *Newcastle* and *Richmond* railroad charter for making compensation for injury to real estate; nor why such compensation might not be included in the assessment for the taking of the land. If a railroad were to pass through a man's door-yard, greater damages would be given for taking ground through it than would be given for the taking of an equal quantity of equally good ground in the midst of an open field, because of the use such ground was put to, and the inconvenience its taking for a railroad would occasion to the proprietor. Why not, in taking the ground occupied by one railroad for the use of another, if its taking would injure the franchise of the former, pay, as in the case of taking the door-yard, an amount of damages compensatory of the whole injury done? But however this might be, the mere surveying and laying down a railroad across another is no injury to the franchise of such other. The running of the cars, if anything, must occasion the interference and injury. And if at present there are not sufficient provisions in the charters of these roads respectively to secure their mutual rights in running their roads, there is yet time enough before they can be completed for the legislature to afford adequate relief in that respect.

Per Curiam.—The decree is reversed with costs. Cause remanded, &c.

D. Kilgore, W. Wright, and D. D. Pratt, for the appellants.

L. Barbour, J. L. Jernegan, and A. G. Porter, for the appellees.

BLOUNT v. RILEY.

Nov. Term,
1852.BLOUNT
v.
RILEY.

A promissory note not payable at a chartered bank, is not, in this state, governed by the law-merchant.

Where a promissory note, whether negotiable by the law-merchant or not, has been assigned after it became due, the admissions of the assignor made before the assignment that the note had been paid, are admissible in evidence against the assignee.

ERROR to the *Spencer* Circuit Court.

Tuesday,
November 23.

BLACKFORD, J.—This was an action of assumpsit brought by *Riley*, the indorsee of a promissory note, against *Blount*, the maker. There are two pleas: 1st. The general issue; 2d. Payment to the payee before his assignment.

The cause was submitted to the Court, and judgment rendered for the plaintiff.

The note is as follows: "*Rockport, Indiana, October 12th, 1845. Due A. G. McCoy, or order, 132 dollars and 62 cents, for value received. (Signed) T. Blount.*" The note was indorsed by the payee to *William W. McCoy*, and by the latter to the plaintiff.

The defendant offered to prove on the trial, by one *Stephen Hyland*, that after the note was due, and when owned by the payee and in his possession, and before it was assigned by him, he, the payee, in a conversation about the note, stated to the witness that the defendant, *Blount*, had made full payment of the note and interest to him, the payee.

The plaintiff objected to this evidence, and the objection was sustained.

This case presents but one question, which is, whether said evidence was admissible.

The note sued on not being payable at a chartered bank, is not governed by the law-merchant. We will consider the case, however, as if the note were so governed, which is more than the plaintiff has a right to ask. The law on the question before us is stated by a late writer as follows: "It has been held that declarations by the holder of a negotiable instrument, made whilst he was holder, are evidence against a plaintiff who claims under

Nov. Term,
1852.

BLOUNT
v.
RILEY.

him, in the same manner as declarations respecting his title made by a former owner of an estate whilst he was in possession, are evidence against a subsequent owner. But there is an obvious distinction between the case of an assignee of land or other property and the assignee of a negotiable instrument. The former has, in general, no title, either at law or in equity, unless his assignor had, but the latter may, as we have seen, have a very good title, though his assignor had none at all. Accordingly, it has been decided that unless the plaintiff on a bill or note stands on the title of a prior holder, the declarations of such former holder are not evidence against him. But if he does stand on the title of a prior holder, as if he have taken the bill overdue or without consideration, then the declarations of that prior holder under whom he claimed, and on whose title he stands, are evidence against him." Byles on Bills, 333.

Mr. *Phillips's* language is as follows: "With respect to admissions by persons in possession of chattels or negotiable securities against subsequent proprietors, which may be thought analogous to admissions by privies in estate, it appears to be a rule that where a person must recover through the title of another, he is bound by the declaration of the party through whom he claims. Thus, if a person brings an action upon a bill of exchange, the declaration of a person, who, at the time when such declaration was made, was holder of the bill, and who had not parted with it till after it was due, is evidence against the plaintiff, being made by one according to whose title his own must stand or fall." 1 *Phillips on Ev.* 394.

The language of Mr. *Greenleaf* is similar to that of the authors we have referred to. He says: "The declarations of a former holder of a promissory note, negotiated before it was overdue, showing that it was given without consideration, though made while he held the note, are not admissible against the indorsee; for, as was subsequently observed by *Parke*, Justice, 'the right of a person, holding by a good title, is not to be cut down by the acknowledgment of a former holder, that he had no title.

But in an action by the indorsee of a bill or note dishonored before it was negotiated, the declarations of the indorser, made while the interest was in him, are admissible in evidence for the defendant.

Nov. Term,
1852.

HARVEY
v.
HARVEY.

"These admissions by third persons, as they derive their value and legal force from the relation of the party making them to the property in question, and are taken as parts of the *res gestæ*, may be proved by any competent witness who heard them, without calling the party by whom they were made." 1 Greenl. Ev. 231.

In the case before us, the note was overdue before the payee's assignment, and, therefore, had the note even been negotiable by the law-merchant, the assignee would have stood in no better situation than the payee. Their interests, as the books have it, are identified, and the payee's admissions before the assignment are admissible in evidence against the assignee.

We are of opinion, therefore, that the evidence offered by the defendant ought to have been admitted.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

L. Q. DeBruler, for the plaintiff.

A. L. Robinson, for the defendant.

HARVEY v. HARVEY and Another.

Trespass for an assault and battery. Plea, that the trespasses were of and concerning the children of the plaintiff, and that after the committing of the trespasses, and before the commencement of the suit, the plaintiff released all causes of action against the defendants by reason of the trespasses, &c.—setting out the instrument of release. The instrument, which related to the children, contained a covenant in which the plaintiff bound herself "to stop all proceedings in law now and hereafter against" the defendants and to let one of the defendants, named therein, have the children whenever he called for them. *Held*, upon demurrer to the plea, that the covenant amounted to a covenant never to sue the defendants for the trespasses complained of.

A covenant never to sue amounts to a release, and is a bar to a subsequent suit.

Nov. Term,
1852.

HARVEY
v.
HARVEY.

Tuesday,
November 23.

ERROR to the *Monroe* Circuit Court.

BLACKFORD, J.—This was an action for an assault and battery brought by *Cassandra Harvey* against *William* and *Maston Harvey*. There are several pleas, the third of which is to the following effect:

The defendants say *actio non*, because they say that, after the committing of said trespass, and before the commencement of this suit, to-wit, on, &c., at, &c., the plaintiff made her writing obligatory, with *Davis Meek* and *Thomas J. Richards*, which writing is as follows:

Know all men by these presents, that we, *Cassandra J. Harvey*, *Davis Meek*, and *Thomas J. Richards*, of, &c., are held and firmly bound to *William Harvey*, of, &c., in the sum of, &c.

The condition of the above obligation is such, that if said obligors (naming them) fulfill the specifications herein described, that is, during the minority (minority) of the children of the said *William* and *Cassandra Harvey* (naming them)—specification first, said *Cassandra* binds herself not to run said children away or seclude them from him; that said *William Harvey* is to have access and communication with said children during their stay with her, said *Cassandra*; and she further binds herself to stop all proceedings in law now and hereafter against *William* and *Maston Harvey*; and she doth further bind herself to let him, said *William*, have said children when he calls for them—then this obligation to be void, else to remain in full force, &c.

By which writing, she, the plaintiff, did remise, release, and forever discharge all rights and causes of action which she then had against said defendants by reason of said several trespasses in said declaration mentioned; which trespasses, the defendants aver, were of and concerning the children of the plaintiff. Wherefore, &c.

There was a demurrer to this plea, assigning for cause that the bond shown was no release of the trespass.

Judgment, on the demurrer, for the defendants.

Whether said third plea is valid or not is the only question in the cause.

It is contended that the bond recited in this plea, contains a covenant never to sue for the trespass. The bond was evidently written by an illiterate person, and we have to look more to the spirit than the letter to get at its meaning. The bond shows that there had been a dispute between the plaintiff and *William Harvey* about their children, and the plea avers that the trespass sued for was concerning the plaintiff's children. When, therefore, the plaintiff, by said bond, binds herself to stop all proceedings in law, now and hereafter, against *William* and *Maston Harvey*, and further binds herself to let said *William* have said children when he calls for them, she may be considered to mean that she would never sue said *William* and *Maston* for said trespass, which, the plea avers, was concerning her children. The language is by no means clear; but taking the whole bond together, with said averment in the plea, and applying to the bond the maxim *verba chartarum fortius accipiuntur proferentem*, we think the plaintiff's meaning is as we have stated it.

Considering the covenant in question, therefore, as a covenant never to sue, it amounts to a release and is a bar to the suit. *Reed v. Shaw et al.*, 1 Blackf. 245.

Per Curiam.—The judgment is affirmed with costs.

J. S. Watts, for the plaintiff.

C. Dewey, for the defendants.

Nov. Term,
1852.

Pow
v.
BECKNER.

POW v. BECKNER and Others.

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The clause in the charter of the town of *Lafayette* which makes it the duty of the marshal to suppress all riots, disorders, disturbances, and breaches of the peace, and with or without process to apprehend all disorderly persons or disturbers of the peace and convey them before a justice, &c., does not authorize the marshal to arrest an offender, without process, for a breach of the peace, after the offense has been committed and the disturbance has ceased.

The marshal who makes the arrest, and persons who, under his command,

Nov. Term,
1852.

Pow
v.

BECKNER.

Wednesday,
November 24.

assist him, under such circumstances, are liable in trespass to the party arrested.

ERROR to the *Tippecanoe* Circuit Court.

SMITH, J.—This was an action of trespass for an assault and battery and false imprisonment, brought by the plaintiff in error against *Beckner*, a marshal of the town of *Lafayette*, and six others.

The defendants pleaded separately and jointly.

The first plea was by all the defendants but *Beckner*.

It alleges that the corporate authorities of the town of *Lafayette* had passed certain ordinances which were in force at the date of the alleged trespasses, by which it was made the duty of the marshal to suppress all riots, disorders, disturbances, and breaches of the peace, and with or without process to apprehend all disorderly persons or disturbers of the peace, and convey them before a justice of the peace; and by which it was further ordained, that if any person or persons, when commanded by the marshal to aid him in apprehending and conveying to any justice's office within said corporation any such offender, should refuse or neglect to obey such command, he or they should, on conviction thereof, be fined, &c. The defendants then aver, that on the eve of a general mob and riot in the night-time, and immediately preceding the commission of said supposed trespasses, the plaintiff did, within the corporate limits of said town, violate the said ordinances by quarreling with and offering to fight a person whose name was unknown to the defendants, and by whooping, screaming, singing blackguard songs, &c., and by resisting the said *Beckner*, who was then and there marshal of the said town, in his efforts to take the said plaintiff into custody; and that these defendants were commanded by the said marshal to assist him, and they did, therefore, assist him to arrest and conduct the plaintiff before a justice of the peace, using no more force than was necessary, which was the trespass complained of.

The second plea was by *Beckner* alone. After reciting the ordinances set out in the first plea, it avers that "the

plaintiff did, within the corporate limits of said town, as this defendant was then and there informed by one —, (whose name is to this defendant unknown,) and as this defendant verily believes, from such information, violate the ordinances of said president and trustees of said town of *Lafayette*, above set forth, by then and there quarreling with and offering to fight one —, (whose name is to this defendant unknown,) and by then and there profanely cursing and swearing," &c.; "wherefore this defendant, fully believing, from said information, that the said plaintiff had immediately preceding thereto been guilty of said acts and violations of said ordinances," did, with the assistance of the other defendants, arrest the plaintiff, &c.

Nov. Term,
1852.

POW
v.
BECKNER.

The third plea is similar to the first, but it was pleaded by the defendants jointly.

The fourth plea, by all the defendants except *Beckner*, after reciting the ordinances, avers that at said town, on the eve of a general mob and riot, in the night-time, and immediately preceding the commission of the said alleged trespasses, these defendants were informed by *Beckner* that the plaintiff had violated said ordinances by quarreling with and offering to fight, &c., and that *Beckner*, being marshal, &c., commanded them to assist him in arresting the plaintiff, and, in obedience to said command, they did assist the said marshal to arrest the plaintiff, which was the same trespass, &c.

The plaintiff filed two replications, one to the first and third pleas, and one to the second and fourth pleas. These replications are alike. They both say the plaintiff did not violate the said ordinances in manner and form, &c. The defendant demurred to the replication to the second and fourth pleas, and the demurrer being sustained, the Court rendered judgment thereon against the plaintiff.

We think the second plea is insufficient. It sets up as a justification of the trespasses complained of, that the marshal was informed by some unknown person that the plaintiff had been guilty of violating the ordinances re-

Nov. Term,
1852.

Pow
v.
BECKNER.

cited, by committing a breach of the peace, and relies upon the supposed power of the officer to arrest without process in such cases. The authority conferred upon the marshal by the ordinance is similar to that possessed by constables and other police officers at common law. It is made his duty to suppress all riots and disorders, and to apprehend either with or without process all disorderly persons or disturbers of the peace, but this should not be construed to mean that he should arrest for a breach of the peace after the offense had been committed and the disturbance had ceased. The obvious intent of the ordinance from which he derives his powers, was to enable him to suppress riots and disorders in actual progress without waiting to procure process, and to this extent the authority given him is reasonable and proper, but an authority to arrest for such offenses after they had been committed without process, and upon vague information communicated to him, would be unnecessary for the preservation of the public peace and liable to great abuses. To justify a constable in apprehending without process for an affray, the affray must take place in his view and be still continuing. After it is over he has no more power to arrest the offenders than any other person. *Cook v. Nethercote*, 6 C. & P. 741.—*Coupey v. Henley*, 2 Esp. 540.—*Fox v. Gaunt*, 3 B. & Ad. 798. The power given to the marshal, who is one of the defendants in this case, is not greater than that possessed by constables, and appears to have been given with the view of placing him upon the same footing with that class of officers.

The fourth plea must also be considered bad. The averments do not show any authority in the marshal to make the arrest, and, consequently, they fail to show that he had any authority to command the assistance of the other defendants. The latter might have required the marshal to inform them what authority he had, and it must be presumed that they knew he had no authority to make the arrest, under the circumstances of the case, without a warrant.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.
J. Pettit and S. A. Huff, for the plaintiff.
Z. Baird and E. H. Brackett, for the defendants.

Nov. Term,
1852.

VANDEVEER
v.
MATTOCKS.

VANDEVEER v. MATTOCKS.

A constable has authority, as a conservator of the peace, to arrest a person charged with a breach of the peace committed within his view, and to detain him a reasonable time for the purpose of taking him before a magistrate.

ERROR to the *Orange* Circuit Court.

Wednesday,
November 24.

SMITH, J.—The plaintiff in error brought an action of trespass for an assault and battery and imprisonment against the defendant in error and several other persons. The declaration contains four counts charging the trespass in several forms.

The only error assigned is the overruling of a demurrer to a separate plea filed by *Mattocks*.

That plea avers that on, &c., a society or congregation of persons had assembled for the purpose of religious worship, and while actually engaged in such worship, the plaintiff refused to obey the rules adopted for the government of the assembly, but stood in the aisles or passages between the seats, refusing to remove therefrom, and made a great noise and disturbance, and thereby greatly disturbed said assembly; that the said defendant, *Mattocks*, being then and there an acting constable of said township, and being in view of the plaintiff's said breach of the peace and disturbance, for the purpose of preventing and stopping said breach of the peace and having the plaintiff before some justice of the peace of said county to answer for his said offense, arrested the plaintiff and took him into custody, and because it was then about eleven o'clock in the night-time, and an inconvenient and

Nov. Term,
1852.

DONNELL
v.
THE STATE.

unseasonable time to take the plaintiff before such justice of the peace, and because the plaintiff requested time to procure counsel to assist him on his trial or examination, the said defendant held the plaintiff in his custody for the space of an hour and a half, and until he gave an assurance that he would appear before a justice of the peace on the next day, and as soon as he gave such assurance, and upon his request, the defendant discharged him from custody; and that the plaintiff, when so arrested, and while so in custody, resisted and endeavored to escape and made an assault upon the defendants, and divers other persons attempted to rescue him out of said custody, wherefore the defendant did a little beat, &c., doing the plaintiff no more injury than was necessary to take and keep him in such custody, which are the same supposed trespasses complained of in the declaration.

We think the demurrer to this plea was correctly overruled. A constable has authority, as a conservator of the peace, to arrest a person for a breach of the peace committed within his view, and to detain the offender for a reasonable time for the purpose of taking him before a magistrate. The circumstances stated in the plea fully justify the detention for the length of time stated.

Per Curiam.—The judgment is affirmed with costs.

H. P. Thornton, for the plaintiff.

R. Crawford, for the defendant.

4478

DONNELL v. THE STATE.

Section 115 of chapter 53 of the R. S. 1843, is void as being contrary to the constitution of the *United States*.

It is error to convict a person under that section.

Wednesday,
November 24.

ERROR to the *Decatur* Circuit Court.

PERKINS, J.—This was an indictment against *Luther A. Donnell*, containing two counts; one charging him with

inducing the escape of, and the other with secreting, "a certain woman of color, called *Caroline*, then being the slave of, and owing service to, one *George Ray*, in the state of *Kentucky*."

Nov. Term,
1852.
CITY OF NEW
ALBANY
V.
MEEKIN.

The defendant was convicted.

The section of the statute of our state upon which this indictment was grounded, according to the decision in *Prigg v. Pennsylvania*, 16 Pet. 539, is unconstitutional and void. The conviction upon it was, therefore, erroneous.

Prosecutions under a state statute against passing counterfeit coin in the similitude of the currency of the *United States*, are sustained on the ground, as we understand by the case of *Fox v. Ohio*, 5 How. U. S. 410, as explained in *United States v. Marigold*, 9 id. 560, that they are in reality for the punishment of private cheats practiced upon the citizens of the state within her jurisdiction by means of the counterfeit coin as the instrument of effecting them. But state statutes punishing the enticing away and secreting of slaves from citizens of other states, are in aid of the execution of the constitution and laws of the *United States* only, and not for the punishment of wrongs perpetrated upon their own citizens.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. Ryman, for the plaintiff.

D. Wallace, for the state.

THE CITY OF NEW ALBANY v. MEEKIN.

8	481
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8	481
147	559

The share of the part owner of a steam-boat which runs on the *Ohio* and *Mississippi* rivers, and occasionally touches at the city of *New Albany* in the course of her voyages, is not liable to be taxed, under the charter of said city, merely from the fact that such part owner is a citizen of that place.

The *situs* of personal property, for the purposes of taxation, does not follow the domicile of the owner.

APPEAL from the *Floyd* Circuit Court.

VOL. III.—61

Wednesday.
November 24.

Nov. Term,
1852.

CITY OF NEW
ALBANY
v.
MEEKIN.

PERKINS, J.—*The City of New Albany* brought an action of debt against *Charles Meekin* to recover the amount of certain taxes assessed against him. *Meekin* pleaded the general issue. The cause was submitted to the Court upon the following statement of facts agreed to by the parties: "Defendant is assessed by plaintiff with a tax of 75 dollars for the year 1850, and a tax of 46 dollars and 28 cents for the year 1851. Defendant is and has been for three years last past the owner of an interest in a certain steam-boat of the value of ——— dollars. The other joint owners of said boat are not residents of the state of *Indiana*. Said boat was enrolled at *Louisville, Kentucky*, and has been, during said three years, running on the *Ohio* and *Mississippi* rivers, and occasionally touching at *New Albany*. When not running, said boat has been laid up at points not in said city. Defendant's joint ownership is fairly worth the sum of ———, and said taxes have been regularly assessed as the proper per centage on said valuation.

"Defendant objects to the payment of said taxes, on the ground that said ownership above specified is not taxable by the plaintiff. It is agreed that if the Court decide," &c. "*Moodey and Hillyer*, for plaintiff. *Thornton and Davis*, for defendant."

The Court below decided for the defendant, and rendered judgment accordingly.

The charter of the city of *New Albany*, section 9, confers upon the "mayor and council" of the corporation the power "to assess annually, against each male inhabitant of the city, who shall be twenty-one years of age, sane, and not a pauper, a poll-tax not exceeding 50 cents; and upon all lands, tenements, and hereditaments, goods and chattels, rights and credits," "which are within the city, such *ad valorem* tax," &c.; and provides that the same shall, from the 1st *Monday* in *April* of each year, "be a lien upon the property so assessed, and a charge against the then owner thereof," &c.

The question in this case, it will be observed, is not what power of taxation the state might have given to the

city of *New Albany*, but what she actually has given; for it will be admitted that the city cannot exercise a power not conferred. The city has power to tax property situated within her limits; and we have only to determine, therefore, whether the steam-boat in question, or the share of it belonging to the defendant, is thus situated. We shall not attempt to lay down a general proposition specifying what property is, and what is not, situated within the corporation of *New Albany*, but shall confine ourselves to the article in this suit subjected to taxation. And we think that neither the said steam-boat, nor the share of the defendant in it, is within said city. It is certainly not actually there, and we think not constructively, within the meaning of the charter. We do not think that, for the purposes of taxation, a Court is authorized to apply the rule of law governing the personal estate of deceased persons which regards its *situs* as following the domicile of the owner. Surely no one would risk asserting the general proposition that, under the charter of *New Albany*, all the personal property owned by every resident of that city, no matter where situated, was liable to be taxed by said city; that if a citizen of *New Albany* was a partner in a steam-boat plying on some river in *California*, or in a flock of sheep kept upon a farm in *Kentucky*, or in some part of *Floyd* county, in this state, out of the corporation of *New Albany*, he was liable to be taxed for it under said charter. The case before us cannot be distinguished. We do not deny that the state might have authorized the city to tax such property, but we think she has not.

Per Curiam.—The judgment is affirmed with costs.

J. C. Moody, for the appellant.

H. P. Thornton and *C. Dewey*, for the appellee.

Nov. Term,
1852.
CITY OF NEW
ALBANY
v.
MEEKIN.

• Nov. Term,
1852.

GIVAN
v.
SWADLEY.

GIVAN v. SWADLEY.

A declaration founded on a written instrument, though the instrument is without a date, should allege a day, month, and year, as the time of its execution; and if the allegation is omitted, the declaration is bad on special demurrer.

An agreement by A. to discharge the balance of a judgment due to B. upon B.'s delivering to him a wagon at a time specified, is a sufficient consideration to support a promise by B. so to deliver it.

Wednesday,
November 24.

ERROR to the *Tippecanoe* Court of Common Pleas.

BLACKFORD, J.—This was an action of *assumpsit* brought by *Givan* against *Swadley*. The declaration, so far as it is necessary to state it, is as follows:

The defendant heretofore, to-wit, at the county aforesaid, made his certain agreement in writing, which is not sealed or dated, but which was executed more than five years ago, by which he promised to make and deliver to the plaintiff, at the farm of *George Pauls*, in *Morgan* county, within three months thereafter, which time has elapsed, a well-finished two-horse wagon. In consideration of which the plaintiff agreed to discharge the balance due him on a judgment of 80 dollars and 36 cents, on the docket of *Obed Foote*, a justice of the peace of *Indianapolis*; which wagon, when delivered, was to be in full of said judgment, and would have been of the value of 100 dollars. On the delivery of the wagon, at the time and place aforesaid, the plaintiff would have been ready to receive it and discharge the judgment. The defendant failed to deliver the wagon at the time and place aforesaid, or at any other time or place, or pay its value, or pay said judgment. Damage 150 dollars.

This declaration was specially demurred to. The causes of demurrer assigned were—1st. That no time was alleged as to when the instrument sued on was executed; 2d. That it appeared that there was no consideration for the promise.

The demurrer was sustained, and judgment rendered for the defendant.

It is evident that the first cause of demurrer is well

founded. The averment that the defendant had executed the instrument sued on being material, a day, month, and year, as the time of its execution, should have been stated. There is no rule of pleading better settled than that, in personal actions, the declaration must state a time when every traversable fact happened. 1 Chitty on Plead. 257. It is true that the time when an instrument declared on was executed, is not generally material. It was not in this case; but still a time should have been stated. The circumstance that this instrument was not dated made no difference. It should, though without date, have been alleged to have been executed on a certain day. The want of this allegation is an objection only as to form, but as the objection is pointed out by the demurrer, it was rightly sustained.

The second cause of demurrer is unfounded. The consideration of the promise declared on was the plaintiff's agreement to discharge the judgment on the defendant's delivery of the wagon according to his promise; and that was, surely, a sufficient consideration.

But as the first cause of demurrer is valid, the judgment for the defendant is right.

Per Curiam.—The judgment is affirmed, with costs.

D. Mace and W. C. Wilson, for the plaintiff.

R. C. Gregory and R. Jones, for the defendant.

DAVIS and Others v. BARTHOLOMEW.

The statute of 1824 enacts that a married woman may, by joining in a deed with her husband, release or convey her dower.

A deed executed while the statute of 1824 was in force, contained the following, which were the only words affecting the dower of the wife, to-wit: "In witness whereof the said *J. B. and R.*, his wife, who hereby relinquishes her right of dower in the above premises, have hereunto set their hands, the date above written." *Held*, that under the said statute, the words quoted amount to a release of dower.

Nov. Term,
1852.

DAVIS
v.
BARTHOLOMEW

The certificate of acknowledgment of a deed executed by husband and wife while the statute of 1824 was in force, was as follows: State of *Indiana*, *Tippecanoe* county, ss. Before me, *D. B.*, recorder within and for said county, personally came *J. B.* and *R.*, his wife, the grantors named in the above deed of conveyance, and being by me examined concerning the same, acknowledged it to be their voluntary act and deed for the uses and purposes therein mentioned. And the said *R.*, the wife of the said *J.*, having been by me examined separate and apart from her said husband, as required by law, touching the above deed, declared that she signed, sealed, and delivered the same, of her own free will and accord, without any coercion or compulsion of her said husband, and that she thereby relinquished all her right and claim to dower in the said premises. In witness, &c. *Held*, that the certificate was sufficient under the statute of 1824.

The joining by a married woman with her husband in the covenants contained in a deed of land, does not convey or release her dower.

The signature and seal of a married woman to a deed executed by her husband, are not sufficient of themselves to release her dower.

To bar dower, the deed itself must contain the words necessary to constitute a conveyance or release, and it cannot be aided by the certificate of acknowledgment.

Dower lies against a tenant in common before partition.

Wednesday,
November 24.

APPEAL from the *Tippecanoe* Circuit Court.

BLACKFORD, J.—This was a bill in chancery filed on the 29th of *November*, 1849, by *Rebecca Bartholomew* against *James Davis* and others. The object of the bill was to obtain dower in a certain lot of ground in *Lafayette*. The bill was demurred to and the demurrer overruled. The defendants having refused to answer, the bill was taken as confessed, and a decree rendered, giving to the complainant dower in said lot. Commissioners were appointed to assign the dower.

The material facts stated in the bill are as follows:

On the 13th of *October*, 1829, one *John Stockton*, being seized in fee of a certain tract of land in *Tippecanoe* county, sold and conveyed the same to *Jeremiah Bartholomew*, the then husband of the complainant. On the 19th of *October*, 1829, said *Jeremiah Bartholomew* and his wife, the complainant, executed to *James Davis*, one of the defendants, a deed as follows:

This indenture, made the 19th day of *October*, 1829, between *Jeremiah Bartholomew*, of the county of *Tippecanoe*, in the state of *Indiana*, of the first part, and *James Davis*, of

the county and state aforesaid, of the second part, witnesseth, that the said party of the first part, in consideration of the sum of 550 dollars, lawful money of the *United States*, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, does hereby grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns forever, all that certain tract or parcel of land situate, &c. Together with all the hereditaments, &c., and all the estate, right, title, claim, and interest whatsoever of the said party of the first (part), either in law or equity, of, in, and to the above-described premises with the hereditaments and appurtenances. To have and to hold the premises above-mentioned and described to the said party of the second part, his heirs and assigns forever. And the said *Jeremiah Bartholomew* does for himself, his heirs, executors, and administrators, covenant, grant, and agree, to and with the said *James Davis*, his heirs, executors, administrators, and assigns, that he, the said party of the first part, is lawfully seized in fee of the aforesaid granted premises, that they are free from all incumbrances, that he is the true and lawful owner of said premises, and has good right, full power, and lawful authority, to sell and convey the same in manner and form aforesaid. And further, that he, the said party of the first part, for himself, his heirs, executors, and administrators, will warrant and forever defend the aforesaid granted premises with the appurtenances and every part thereof to the said party of the second part, his heirs and assigns forever, against all lawful claims and demands of any person and all persons whomsoever. In witness whereof the said *Jeremiah Bartholomew* and *Rebecca*, his wife, who hereby relinquishes her right of dower in the above premises, have hereunto set their hands, date above written. *Jeremiah Bartholomew* [seal], *Rebecca Bartholomew* [seal]. Signed, sealed, and delivered in the presence of *David Bugher*.

Nov. Term,
1852.

DAVIS
v.
BARTHOLOMEW

The certificate of acknowledgment of this deed is as follows:

State of *Indiana*, *Tippecanoe* county, ss. Before me,

Nov. Term, 1852. *Daniel Bugher*, recorder within and for said county, personally came *Jeremiah Bartholomew* and *Rebecca*, his wife, the grantors named in the above deed of conveyance, and being by me examined concerning the same, acknowledged it to be their voluntary act and deed for the uses and purposes therein mentioned. And the said *Rebecca*, the wife of the said *Jeremiah*, having been by me examined separate and apart from her said husband, as required by law, touching the above deed, declared that she signed, sealed, and delivered the same of her own free will and accord, without any coercion or compulsion of her said husband; and that she thereby relinquished all her right and claim to dower in the said premises. In witness whereof I have hereunto set my hand and seal this 19th of *October*, 1829. *Daniel Bugher* [seal], recorder.

DAVIS
v.
BARTHOLOMEW

This deed is indorsed as follows: A true record. Recorded *January* 3d, 1831. *Daniel Bugher*, recorder.

The land described in this deed is the same land sold and conveyed as aforesaid by *Stockton* to *Bartholomew*.

On the 3d of *November*, 1829, the said *Jeremiah Bartholomew* and the complainant, his wife, and said *James Davis*, and his wife, executed to one *Canada Fink* a deed as follows:

This indenture, made the 3d of *November*, 1829, between *Jeremiah Bartholomew* and *James Davis*, of the county of *Tippecanoe*, in the state of *Indiana*, of the first part, and *Canada Fink* of the same place, of the second part, witnesseth, that the said party of the first part, in consideration of the sum of 207 dollars, lawful money of the *United States*, to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do hereby grant, bargain, sell, convey, and confirm unto the said party of the second part, his heirs and assigns forever, all that certain tract, &c., with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining; and all the estate, right, title, claim, and interest whatsoever, of the said party of the first part, either in law or equity, of, in, and to the above-described premises, with the said hereditaments and ap-

purtenances. To have and to hold the premises above mentioned and described, to the said party of the second part, his heirs and assigns forever. And the said *Bartholomew* and *Davis*, and their wives, do for their heirs, executors, and administrators, covenant, grant, and agree, to and with the said *Canada Fink*, his heirs, executors, administrators, and assigns, that they, the said party of the first part, are lawfully seized in fee-simple of the aforesaid granted premises, that they are free from all incumbrances, that they are the true and lawful owners of said premises, and have good right, full power, and lawful authority to convey and sell the same in manner and form aforesaid. And further, that they, the said party of the first part, for themselves, their heirs, executors, and administrators, will warrant and forever defend the aforesaid premises, with their appurtenances, and every part thereof, to the said party of the second part, his heirs and assigns forever, against all lawful claims and demands of any person and all persons whomsoever. In witness whereof the said *Bartholomew* and *Davis*, and their wives, have hereunto set their hands and seals the day and year first above written. *Jeremiah Bartholomew* [seal]. *Rebecca Bartholomew* [seal]. *James Davis* [seal]. *Mary Davis* [seal]. Signed, sealed, and delivered in the presence of *Daniel Bugher*.

Nov. Term,
1852.

DAVIS
v.
BARTHOLOMEW

The certificate of acknowledgment to the last-named deed is as follows :

State of *Indiana*, *Tippecanoe* county, ss. Before me, *Daniel Bugher*, recorder within and for said county, personally came *Jeremiah Bartholomew*, *James Davis*, and their wives, the grantors named in the above deed of conveyance, and being by me examined concerning the same, acknowledged it to be their voluntary act and deed for the uses and purposes therein mentioned. And the said *Rebecca* and *Mary*, the wives of the said *Bartholomew* and *Davis*, having been by me examined separate and apart from their said husbands, as required by law, touching the above deed, declared that they signed, sealed, and delivered the same of their own free will and accord, with-

Nov. Term,
1852.

DAVIS
v.
BARTHOLOMEW

out any coercion or compulsion of their said husbands, and that they thereby relinquished all their right and claim to dower in the said premises. In witness whereof I have hereunto set my hand and seal this 3d of *November*, 1829. *Daniel Bugher* [seal], recorder.

The last-named deed is indorsed as follows: A true record. Recorded *October* 18th, 1830. *Daniel Bugher* [seal], recorder. The lot in which the bill prays dower is a part of the land described in the last-named deed, and is a part of the tract described in the aforesaid conveyance to *Davis*.

Bartholomew, the complainant's husband, died in 1843.

On the 16th of *October*, 1849, the complainant demanded her dower in said lot of *Connelly*, one of the defendants, who was then in possession of the premises under a title derived from said *Fink*.

The first question is, whether the complainant's claim to dower was affected by the deed which she and her husband executed to *Davis*.

The only words in that deed bearing on the question are the following: "In witness whereof the said *Jeremiah Bartholomew* and *Rebecca*, his wife, who hereby relinquishes her right of dower in the above premises, have hereunto set their hands, date above written."

The statute of 1824, which governs this case, expressly enacts that a married woman may, by joining in a deed with her husband, release or convey her dower. Acts of 1824, p. 334.

There can be no doubt, we think, but that the above-quoted words amount to a release of dower.

The certificate of acknowledgment is sufficient under the statute of 1824, which was in force when it was given. *Stevens v. Doe d. Henry*, 6 Blackf. 475.

The complainant, therefore, by her deed to *Davis*, parted with her dower in the moiety of the land described in that deed.

The next question is as to the effect of the aforesaid deed to *Fink* on the complainant's claim.

The only parts of this deed relied on against the com-

plainant are her covenants that the party of the first part, that is, her husband and *Davis*, were lawfully seized of the premises; that the premises were free from incumbrances; that said party of the first part were the lawful owners of the premises, and had good right to sell the same; and that said party of the first part would warrant and defend the premises to the party of the second part.

Nov. Term,
1852.

DAVIS
v.
BARTHOLOMEW

These covenants do not amount to a conveyance or release of dower. They are the mere covenants of a married woman which she had no power to make, and by which she is not bound. *Aldridge v. Burlison et ux.*, 3 Blackf. 201.

The effect of this deed, therefore, is the same as if the complainant had not been mentioned at all in the body of it. Her signature and seal are to the deed, but they are not sufficient, of themselves, to bar her claim. *Cox et al. v. Wells*, 7 Blackf. 410.

Nor is the complainant barred of her dower by the circumstance, that the justice's certificate states that she acknowledged before him that she had voluntarily executed the deed, and thereby relinquished her right of dower. The deed itself must contain the words necessary to constitute a conveyance or release, or the claim of dower is not barred. 4 Kent's Comm. 59.

From the view we have taken of the case, it appears that a decree should have been rendered in favor of the complainant for dower in an undivided moiety of the lot in *Lafayette* described in the bill.

That dower lies against a tenant in common before partition, is decided in *Sutton et ux. v. Rolfe*, 3 Levinz, 84.

Per Curiam.—The decree is reversed, with costs. Cause remanded with instructions to the Circuit Court to render a decree in favor of the complainant for dower in an undivided moiety of the lot described in the bill.

Z. Baird, for the appellants.

H. W. Chase, for the appellees.

Nov. Term,
1852.

HOWELL
v.
LEMON.

HOWELL v. LEMON and Others.

Debt upon a promissory note for 70 dollars. The defendants pleaded, that the plaintiff had previously purchased a printing-office and fixtures of *A. and B.* at a price specified, and had given them a mortgage to secure the purchase-money; that on the same day the plaintiff sold the printing-office, &c., to the defendants for 70 dollars, and took their note therefor, being that sued on, and that the defendants were to have the privilege of purchasing the claim of *A. and B.* upon such terms as they could, and if they should make the purchase so as to release the plaintiff from any liability to *A. and B.*, the defendants were to have the ownership upon paying the plaintiff the amount specified in said note, but if they should not make the purchase, they were to pay said sum of 70 dollars for the use of the property a year, during which time the plaintiff agreed to assure the possession of it. The plea then averred that the defendants had purchased the claim of *A. and B.* and procured the plaintiff's release from all claims of *A. and B.* for the purchase-money, whereby they became invested with the entire property in the printing-office, &c., and so the consideration of the note had failed. *Held*, that the facts showed no failure of consideration, and that the plea was bad.

Friday,
November 26.

ERROR to the *Madison* Circuit Court.

SMITH, J.—Debt upon a promissory note for the payment of 70 dollars, made by *Lemon and Ryan* in favor of the plaintiff in error.

The defendants below pleaded the general issue, and also a special plea stating certain facts which they averred amounted to a failure of consideration. A demurrer to the special plea was overruled, and judgment was thereupon rendered for the defendants.

That plea alleged that an agreement in writing had been entered into by the parties at the time the note was made. The agreement was set out on oyer and is, substantially, to the following effect: That *Howell*, the plaintiff below, had previously purchased a certain printing-office and fixtures of *Woolman and Brownlee* at the price of 500 dollars, and had given the latter-named persons a mortgage thereon to secure the payment of the purchase-money; that *Howell* had, on the day of making this agreement, sold the said printing-office and fixtures to the defendants for 70 dollars, and had taken their note therefor; (this was the note now sued upon). And that the de-

defendants were to have the privilege of purchasing the claim of *Woolman* and *Brownlee* upon such terms as they could, and if they succeeded in purchasing *Woolman* and *Brownlee's* claim, so as to release *Howell* from any liability to those persons, the defendants were to have the ownership of the property, they paying to *Howell* only the 70 dollars in the note specified; but if they did not purchase the claim of *Woolman* and *Brownlee* they were to pay the said sum of 70 dollars for the use of the property for a period of one year, during which time *Howell* agreed to assure the possession of it.

The defendants averred that they did purchase the claim of *Woolman* and *Brownlee*, and procure the release of the plaintiff from all claims against him for the purchase-money he had agreed to pay *Woolman* and *Brownlee*, wherefore, the defendants say they have become invested with the entire property in said printing-office and fixtures, and the consideration of said note has failed.

The Court below must have misapprehended the terms of the agreement thus set out. It is distinctly stated that the note was to be paid whether the defendants purchased the claim of *Woolman* and *Brownlee* or not. If they did purchase that claim, the consideration was the purchase of the rights which the plaintiff had acquired, or the transfer of his bargain with *Woolman* and *Brownlee* to the defendants. If they did not purchase it, they were to pay the sum specified for the rent of the property. Their averment that they did purchase *Woolman* and *Brownlee's* claim does not show any failure of the consideration.

Per Curiam. — The judgment is reversed with costs. Cause remanded, &c.

D. Kilgore, for the plaintiff.

J. Davis, for the defendants.

Nov. Term,
1852.

HOWELL
v.
LEMON.

Nov. Term,
1852.

HARRIS

v.
DOE.

HARRIS and Others v. DOE on the Demise of SPENCER.

The 6th article of the treaty made by the *United States* on the 6th of October, 1818, with the *Miami* nation of *Indians*, provided that the several tracts of land which the *United States* therein engaged to grant should never be transferred by the grantees or their heirs without the approbation of the president of the *United States*. Pursuant to the treaty certain premises were granted to B., an *Indian* woman, and afterwards the president, upon her petition, gave his approval to her selling a part of the land and to the division of the rest among her children. She did accordingly sell a part of the land, but shortly afterwards died without having made any partition of the residue to her children. *Held*, that the children took the land by descent and could not, therefore, convey it, and that a deed of conveyance from them was not voidable merely, but void.

A party whose land has been sold at sheriff's sale upon an execution against him, cannot, in ejectment to recover possession of the premises, show that his own title was defective, to prevent a recovery; but third persons in possession may.

Friday,
November 26.

APPEAL from the *Allen* Circuit Court.

SMITH, J.—This was an action of ejectment commenced by the appellee. At the *February* term of the Circuit Court, in 1848, *Samuel Harris* applied and was admitted as defendant. At the *October* term following, by consent of the plaintiff's lessor, *Steinberg* and *Fell* were made defendants with *Harris* upon the usual terms.

At the said last-mentioned term of the Circuit Court, there was a trial by jury which resulted in a verdict for the plaintiff. A motion for a new trial was overruled and the plaintiff had judgment.

All the evidence is set out in a bill of exceptions.

The plaintiff's lessor claimed title under a sheriff's deed made pursuant to a sale of the premises in controversy by virtue of an execution which had issued on a judgment against *Samuel Harris*, in favor of one *Dawson*, rendered by the *Allen* Circuit Court in *October*, 1838.

The plaintiff also gave in evidence a deed, dated *May* 1st, 1834, executed by *Elisha B. Harris*, and wife, conveying the premises to *Samuel Harris*, with covenants of general warranty.

There was also proof that *Elisha B. Harris* had been in

possession of the premises prior to the commencement of this suit. Nov. Term,
1852.

The plaintiff further proved that the title of *Elisha B. Harris* was founded on a deed dated *January 1st, 1831*, executed to him by certain persons as the heirs of one *Josette Beaubien*, to whom the premises in question had been granted by the *United States* pursuant to a treaty with the *Miami* nation of *Indians*, made on the 6th of *October, 1818*.

HARRIS
v.
DOE.

The 6th article of that treaty provided that the several tracts of land, which the *United States* therein engaged to grant, should never be transferred by the grantees or their heirs, without the approbation of the president of the *United States*.

It was proved that *Josette Beaubien*, about the year 1825, petitioned the president of the *United States* for authority to sell a portion of the land granted to her to procure means for her support, and to divide the remainder among her children. This application was granted by the president of the *United States*, and his approval, under the authority vested in him by the 6th article of the treaty, to sell a portion of the land and to divide the remainder among her children, was given.

Josette Beaubien did accordingly sell a portion of the land, but shortly after, in the same year, 1825, died, without having made any partition of the remainder to her children. Those children made their deed to *Elisha B. Harris* as heirs, and not as the grantees, of their mother, *Josette*.

It is contended by the counsel for the defendant in error, that the consent of the president of the *United States* to the alienation of the premises, having been once given, no further approbation was necessary to enable the heirs of *Josette* to make the conveyance to *Elisha B. Harris*. It is said the estate existed in the heirs in the same quality and to the same extent, whether they took as purchasers under a division or by descent. We do not know that such would be the case. If their mother had made a division, she might or might not have made an equal one.

Nov. Term,
1852.

HARRIS
v.
DOE.

The restriction upon the ability of the *Indians* to convey the lands granted to them by the treaty, was intended for their benefit, and such restrictions have always received a liberal construction. It is founded upon the supposition that they are incompetent to traffic with the whites upon equal terms, as a general rule, and from their simplicity and ignorance liable to be easily imposed upon. The government, in giving lands to them, humanely desired to protect them from such imposition, and provided that they should not transfer them, unless the president of the *United States* should be satisfied that the transfer was a judicious one, and made for a reasonable consideration.

The president, in giving his consent to a petition for authority to sell such lands, would undoubtedly be influenced by the particular circumstances of the case, such as the capacity or discretion of the person desiring such authority, the object for which the sale was to be made, &c. We do not think it would be proper to apply his consent given to one person to sell to a sale by another person. In this case, the mother, *Josette*, may have been a very competent person to make sale of the premises, and her heirs totally incompetent. It is not to be inferred that because the president consented to a sale by *Josette* that he would, therefore, have consented to a sale by her heirs, and as *Josette* did not exercise the authority given to her to divide the land among her children, the latter must be considered as having taken it by descent and with the restriction upon their ability to transfer it provided by the treaty. *Josette* may, herself, for anything we know to the contrary, have finally concluded that her children, or some of them, were unfit to be entrusted with the power to convey their land, and for that reason purposely refrained from making a division among them.

It is also urged that a subsequent approbation of the president might have made the deed of *Josette's* heirs good, and that it was voidable merely. There is, however, no proof of any such subsequent approbation.

We think, therefore, that in this case, the title to the premises in controversy is shown to be outstanding in

the heirs of *Josette Beaubien*, and the plaintiff must fail unless the defendants are precluded from availing themselves of this fact. It is well established that an execution-defendant cannot avail himself of this species of defence against a purchaser at a sale under the execution, and had *Samuel Harris* been the sole defendant, the plaintiff would have still been entitled to recover his term, for *Samuel Harris* would not have been permitted to resist the claim of the plaintiff to be placed in possession by alleging that his own title was defective.

But the other two defendants, *Steinberg* and *Fell*, do not stand upon the same ground, and it being admitted that they were in possession of the premises, they cannot be turned out without a good title being shown in the plaintiff. The judgment must, consequently, be reversed.

Per Curiam. — The judgment is reversed with costs. Cause remanded, &c.

R. Brackenridge and *D. H. Colerick*, for the appellants.

J. B. Howe, for the appellee.

Nov. Term,
1852.

GASTON
v.
BOARD OF
COMMISSION-
ERS OF MARION
COUNTY.

8 497.
153 378

GASTON v. THE BOARD OF COMMISSIONERS OF MARION COUNTY.

A *post mortem* examination made by a physician at the request of the coroner is not a service covered by the physician's employment to attend upon the county poor.

A physician is not entitled to any greater compensation for traveling to and giving evidence at a coroner's inquest, in obedience to a subpoena, than any other witness.

The expenditure of labor and skill by the physician in a *post mortem* examination will, however, entitle him to additional compensation.

The coroner may, where a *post mortem* examination is necessary, employ a physician to make the examination and the county will be liable for the expense.

The board of commissioners of a county have jurisdiction of the claim of a physician for services rendered in a *post mortem* examination made at the request of the coroner, and the judgment rendered by the board on

Nov. Term,
1852.

GASTON
v.
BOARD OF
COMMISSION-
ERS OF MARION
COUNTY.

Friday,
November 26.

the claim, if brought before them according to the statute, is, while unreversed, conclusive.

To give the board jurisdiction of the claim, it is not necessary that it should be brought before them like a formal suit at law.

ERROR to the Marion Circuit Court.

PERKINS, J.—Dr. *Gaston* sued the commissioners of *Marion* county for services rendered in a *post mortem* examination of the body of a deceased person, which examination was made upon the call of the coroner of the county. Judgment for the defendant in the Circuit Court.

The case was submitted and decided upon the following agreement as to the facts:

"It is agreed that an inquest was held over the body of *James Smither* on the 14th of *March*, 1849, in the county of *Marion*, by *Peter Newland*, as the coroner of said county; and that he is the coroner of said county; that for the purpose of enabling the jury to determine by what means the said *James Smither* (who it was supposed came to his death by poisoning) came to his death, it was necessary to have a *post mortem* examination of the body of said *Smither*, who had been dead and buried eight days; that the plaintiff was subpœnaed by said coroner for that purpose, and, failing to attend upon said subpœna, an attachment was issued for said plaintiff, who was accordingly attached and brought thereunder to *Pike* township, in said county, where said inquest was held; and there, under the direction of said coroner, made, with the assistance of others, the *post mortem* examination of said *James Smither*, deceased, and was there sworn as a witness in the case, and testified to said jury as a witness, and communicated to them the result of that examination, and his opinion of the means by which said *Smither* came to his death;" that the examination was fourteen miles from the residence and office of said *Gaston*, and occupied the space of two hours; that said *Gaston* had, previously to commencing this suit, filed his claim for compensation with the county commissioners who had rejected it, and no appeal had been taken; that at the time said *Gaston*

made said examination he was one of the physicians employed by the county, at a given salary, to attend upon all county paupers; that if he is entitled to recover at all in this case, the judgment shall be for 25 dollars.

This agreement is signed by *Ketcham* and *Taylor* for the plaintiff, and *R. L. Walpole* for the defendants.

The service rendered in this case by Dr. *Gaston* was not covered by his employment to attend upon the county poor. He was entitled to no compensation for that service so far as the traveling and giving testimony in obedience to the subpoena were concerned, beyond that of an ordinary witness. Physicians are not specially privileged in this particular. But the expenditure of labor and skill in the *post mortem* examination created a claim to additional compensation from some source. Either the coroner who procured the service, or the county, should pay for it.

We have no doubt that in a case where a *post mortem* examination is really necessary the coroner may, by his employment, bind the county to the payment for a sufficiency of professional skill to make the examination. To that extent, at least, he must be the agent of the county (1).

But whether the employment of the plaintiff in the present case was such as to entitle him to compensation from the county or not, we have not to determine. The agreement upon which the cause was submitted states that said plaintiff had, before the commencement of this suit, presented his claim for his service in said *post mortem* examination, in company with the claims of two other physicians, to the board of commissioners of *Marion* county, before whom it was docketed, heard, and decided against said plaintiff, all of which appears of record, and that no appeal had been taken from that decision.

That judgment of the commissioners bars this suit. The commissioners were a Court having jurisdiction of the cause; it was brought before them in the manner pointed out by the statute, and their judgment, while unreversed, is conclusive. See the case of *The State v. Conner*, 5 Blackf. 325. It is not material that the claim was

Nov. Term,
1852.

GASTON
v.

BOARD OF
COMMISSION-
ERS OF MARION
COUNTY.

Nov. Term,
1852.

WILLEY
v.
THE STATE.

not brought before said commissioners in the manner of a formal suit at law. It was not necessary to give the commissioners jurisdiction that it should be so brought. See *Hart v. The Board of Commissioners of Vigo county*, 1 Carter's Ind. R. 309. And section 23, R. S. p. 184.

Per Curiam.—The judgment is affirmed, with costs.

J. L. Ketcham and N. B. Taylor, for the plaintiff.

R. L. Walpole, for the defendants.

(1) See *Alleghany County v. Watt*, 3 Penn. State R. 462.

WILLEY and Others v. THE STATE on the Relation of SMITH.

The language of a bond was as follows: Know all men that we, *A. B., C. D.*, and *E. F.*, are held and firmly bound unto, &c., in the sum, &c., for the payment of which, &c., we bind ourselves, &c., severally and firmly by these presents. *Held*, that the bond was joint as well as several.

Friday,
November 26.

ERROR to the Crawford Circuit Court.

BLACKFORD, J.—This was an action of debt brought by *The State*, on the relation of *Smith*, against *Willey* and two others.

The suit was founded on a bond as follows :

Know all men by these presents that we, *Elam Willey, J. N. Phelps, John Lyntch*, are held and firmly bound unto the state of *Indiana* in the sum of 6,000 dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, severally and firmly, by these presents. Sealed, &c.

The condition of the above obligation is such, that whereas the above-named *Elam Willey* has been this day, by the Probate Court, &c., appointed guardian, &c.; now if the said *Elam Willey*, as guardian as aforesaid shall well and truly discharge his duties, &c., then, &c., else, &c.

General demurrer to the declaration, and judgment for the plaintiff. Nov. Term,
1852.

The only objection made to the declaration is, that the bond sued on is not joint, but several only.

HESLER
v.
DEGANT.

It appears to us that this objection is not tenable. Bonds conditioned like the one before us, are, generally, joint and several; and that the parties intended this bond to be so, we have no doubt. The obligors first say they are held and firmly bound to the state in the sum of, &c. So far the bond is joint. They then say further, that, for the payment of said sum, they bind themselves severally and firmly. This last clause makes the bond several. These parts of the bond, taken together, make the bond joint and several.

Per Curiam.—The judgment is affirmed with costs.

J. Collins, Jr., and H. P. Thornton, for the plaintiffs.

W. A. Porter, for the defendant.

HESLER v. DEGANT.

An objection to evidence given in a cause tried before the passage of the act of 1851 on the subject, will be held to have been properly overruled, if the ground of the objection does not appear in the record.

The defendant in slander having offered in evidence the deposition of a witness tending to sustain a plea in justification of the speaking of a part of the words laid in the declaration, the plaintiff objected to the deposition—stating that those words were not relied upon by him. The Court sustained the objection, directing the jury to disregard those words; and in their charges instructed the jury that those words being withdrawn, were not to be considered by them. *Held*, that the rejecting of the deposition did not injure the defendant.

In slander for words spoken of the plaintiff in his trade, if the words proved assume that, when they were spoken, the plaintiff was carrying on such trade, there is no need of proving that fact.

Objections to instructions given to the jury will not be regarded, if the record does not show that the instructions were excepted to when they were given, or at any time before the jury gave their verdict.

Evidence of actionable words spoken by the defendant of the plaintiff after the commencement of the suit, is admissible, in slander, to show the

Nov. Term,
1852.

HESLER
v.
DEGANT.

Friday,
November 26.

motive with which the words were spoken for which the suit was brought.

APPEAL from the *Decatur* Circuit Court.

BLACKFORD, J.—*Degant* brought an action of slander against *Hesler*.

The declaration states that, on, &c., at, &c., the plaintiff was, by trade, a tanner and currier, and carried on the business of a tanner and currier; that the defendant, in a conversation of and concerning the plaintiff and his said business, spoke and published of and concerning the plaintiff in his said business, the following words: He (meaning the plaintiff) is a good for nothing rascal; he takes the people's good hides and sells them, and gives them (meaning said people) trash, good for nothing leather; and all the leather he makes is good for nothing; he (the plaintiff meaning) marks other men's sheep; thereby intending to charge the plaintiff with dishonesty in his said business and with larceny.

There are two pleas:

First, the general issue.

Secondly, as to the words that the plaintiff marked other men's sheep, that the charge was true.

Replication to the second plea, *de injuria*.

Verdict for the plaintiff for 167 dollars, and judgment on the verdict.

The facts proved were substantially as follows:

The plaintiff was, by trade, a tanner and currier, and carried on the business of his trade. Before the commencement of the suit, the defendant said of the plaintiff that he was a good for nothing rascal; that all the leather he made was good for nothing; that he would take the people's good hides and keep them, and give them bad leather. After the commencement of the suit, the defendant said that the plaintiff was in the habit of getting good hides and letting the people have poor ones.

The defendant also said that the plaintiff was a sheep-marker.

Every part of the plaintiff's evidence was objected to, but the objection was overruled.

As the ground of objection to the plaintiff's evidence does not appear, and the trial was before the passage of the act of 1851 on the subject, we must presume the objection to have been rightly overruled.

Nov. Term,
1852.

HEELER
v.
DEGANT.

The defendant, at the proper time, offered in evidence a deposition tending to sustain his second plea. The plaintiff objected to the deposition, stating that the words to which the plea related were not relied on by him. The Court sustained the objection, directing the jury to disregard those words. The Court, again, in their charges to the jury, instructed them as follows: "The words about marking sheep being withdrawn by the plaintiff, are not to be considered by the jury."

We think that, under those circumstances, the rejecting of the deposition did not injure the defendant.

It is contended by the defendant that there was no proof that when the words respecting the plaintiff's trade were spoken, the plaintiff was carrying on his trade.

It was proved that the plaintiff was a tanner and currier, and that the defendant said of him (as alleged in the declaration) *that he was a good for nothing rascal, and that all the leather he made was good for nothing*. This charge assumes that, at the time it was made, the plaintiff was engaged in his business of making leather, that is, of a tanner and currier; and there could be no need of proving what the words themselves assumed. *Hays v. Allen*, 3 Blackf. 408.

That the words just referred to, spoken of the plaintiff in his trade, are actionable, there can be no doubt. It has been recently held that the words, "You are a rogue and a swindling rascal; you delivered me 100 bushels of oats worse by 6d. a bushel than I bargained for," were actionable when spoken of a person who carried on the business of a corn-vendor. *Thomas v. Jackson*, 3 Bingh. 104.

The defendant objects to some of the instructions given to the jury. The answer to this objection is, that the record does not show that the defendant excepted to any of

Nov. Term,
1852.

THE STATE
v.
BOWDEN.

the instructions when they were given, or at any time before the jury gave their verdict.

Some of the words proved were spoken after the suit was commenced; but, at the time they were proved, the plaintiff stated that he did not offer the evidence to increase the damages. The Court, as to the evidence last mentioned, instructed the jury as follows: "No damages can be given for any words not actionable, nor for words spoken after suit was brought. The only use the jury can make of such words is for the purpose of ascertaining the feelings or motives under which defendant spoke the other words for which action is brought." The admission of this evidence cannot, therefore, be considered erroneous. *Schoonover v. Rowe*, 7 Blackf. 202, and note.—2 Saund. Plead. and Ev. 951.

Per Curiam.—The judgment is affirmed with 6 *per cent.* damages and costs.

J. Robinson and *A. Davison*, for the appellant.

J. S. Scobey, for the appellee.

THE STATE on the Relation of *PIERSON v. BOWDEN*.

The admission of an administrator that a claim against the estate is just, or an order of the Probate Court that it shall be paid, is, under the R. S. 1843, a sufficient establishment of the claim.

After the claim has been thus established, the creditor must make a demand of payment of the administrator, before suit can be maintained upon his bond for its non-payment.

Saturday,
November 27.

ERROR to the *Martin* Circuit Court.

SMITH, J.—This was an action of debt on the bond of an administrator against *Bowden* one of the sureties. The breach alleged is, that on the 27th of *December*, 1840, the relator obtained a judgment for 108 dollars against the intestate, who was then living; that after the death of the intestate, to-wit, on the 3d of *November*, 1841, the bond sued upon was made and the administrator qualified; that

on the 5th of *November*, 1842, a transcript of the judgment was filed in the Probate Court of *Martin* county, admitted to be correct by the administrator, and allowed by the Court for payment out of the estate; that afterwards, during the year 1844, the administrator collected the sum of 300 dollars, due the estate, and paid out the same on debts of an inferior class which should have been postponed until after payment of that of the relator; that the estate was and is insolvent; and that the relator's judgment remains in full force and unpaid.

Nov. Term,
1852.
THE STATE
v.
BOWDEN.

A demurrer was sustained to the declaration, and judgment was rendered for the defendant.

One of the objections made to the declaration is the want of an averment that the plaintiff had obtained a judgment against the estate of the intestate. The case of *Eaton v. Benefield*, 2 Blackf. 52, is cited in support of this objection, but it is not applicable. The Revised Statutes of 1843 provide that—

“After a creditor is entitled by law to the payment of his debt from the executor or administrator, out of moneys properly applicable thereto, which shall have come into the hands of such executor or administrator, and the amount of his claim has either been admitted to be just, or allowed by such executor or administrator, or has been ascertained by judgment or award, or by an order of the Probate Court for the payment thereof on distribution, the bond given by such executor or administrator may be put in suit by such creditor, if the executor or administrator, upon demand made, shall neglect or refuse to pay such claim.” Section 400, p. 561.

It is averred in the declaration that the relator's demand was admitted to be just, and also that the Probate Court had ordered its payment; and either of these acts, under the statute then in force, would have been a sufficient establishment of the claim.

But it is also objected to the declaration that there is no averment of a demand of payment of the administrator, and this is a fatal defect. The statute above quoted evidently requires a special demand to be made of the

Nov. Term, administrator, in cases like the present, before suit can
1852. be brought upon his bond.

CONKLIN	<i>Per Curiam.</i> —The judgment is affirmed with costs.
V.	
WHITE WATER	<i>J. S. Watts</i> , for the plaintiff.
VALLEY CA-	
NAL COMPANY.	<i>G. G. Dunn</i> , for the defendant.

CONKLIN v. THE WHITE WATER VALLEY CANAL COMPANY.

If a plea of license answers the gravamen of the declaration, proof of the license will defeat the suit.

Where an instruction given to the jury is objected to, but the evidence given at the trial is not contained in the record, and it does not, of itself, appear to be objectionable, the verdict of the jury will not be set aside.

Saturday,
November 27.

ERROR to the *Wayne* Circuit Court.

SMITH, J.—This was an action of trespass on the case brought by *The White Water Valley Canal Company* against *Conklin*. The injury complained of in the declaration was, that the defendant illegally, wrongfully, and without the consent of the plaintiff, dug a certain trench or tail-race from a mill belonging to him, so as to conduct the water from said mill into a feeder of the canal of the plaintiff, and thereby lowered and diminished the bank of said feeder, and left the loose earth, sand, and gravel in and upon the channel and banks of said tail-race liable to be removed and washed into said feeder, which would not have been thus exposed if the defendant had not made said tail-race; by means whereof, and by reason of a large quantity of water running out of the *Hagerstown* canal and into a certain stream of water running near to said mill and tail-race, and by reason of said last-mentioned stream being greatly swollen with water, the said last-named stream broke through the loose earth, sand, and gravel so cut, dug, and left loose as aforesaid along and upon said tail-race, and washed a large quantity thereof into said feeder, whereby the plaintiff was

put to great trouble and expense in clearing out and removing the obstructions to the flowage of the water through said feeder caused thereby, &c.

Two pleas were filed upon which issues were taken. One of these pleas is, in substance, that the grievances complained of were done with the leave and license of the plaintiff. The jury returned a verdict for the plaintiff, and a motion for a new trial was overruled.

Upon the trial, the Court, after instructing the jury as to the facts from which they might infer a license to tap the canal-feeder with the tail-race of the mill, told them they must bear in mind that a mere license to enter the canal-feeder with the tail-race of the mill, either expressly given or implied from circumstances, does not cover the ground of complaint for leaving the loose earth, sand, and gravel on and along the line of the tail-race, in consequence of which they were washed into the canal-feeder as alleged; that a license to dig the race and enter the canal-feeder carried with it all the consequences necessarily flowing therefrom, but if the leaving the loose earth, sand, and gravel along the line of the race, in the manner alleged in the declaration, was not a necessary consequence flowing from the digging of the race, and entering the canal-feeder, then a license to dig the race and enter the feeder would not justify the case, and under such a state of facts they should find for the plaintiff.

We think this instruction is erroneous. The gravamen of the declaration is for the illegal digging of the tail-race. Consequently the issue made by the plea of leave and license covers the whole subject of complaint, and proof of such license defeats the suit. As no carelessness was averred in the declaration it was not competent for the plaintiff, under this issue, to prove that the injury resulted from the improper or careless manner in which the tail-race was constructed.

The plaintiff in error also complains of an instruction given relative to the measure of damages. That instruction was, that if the jury found for the plaintiff, the measure of damages should be the amount of damages or

Nov. Term,
1852.

CORRECTION
V.

WHITE WATER
VALLEY CA-
NAL COMPANY.

Nov. Term,
1852.

UPTON
v.
STARR.

injury sustained by the plaintiff immediately flowing from the acts complained of, or, in other words, the expenses necessary to clean out any dirt, sand, and gravel washed into the feeder, &c., in consequence of the wrongful acts of the defendant, injurious to the navigation and use of the feeder, with any other damages sustained by the company necessarily and unavoidably flowing from any hindrance to the navigation or use of the feeder or canal, in consequence of the defendant's wrongful acts.

The evidence given upon the trial is not set out in the record, and we cannot say, without a knowledge of the facts to which it was applied, that there is anything objectionable in this instruction.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Rariden and S. W. Parker, for the plaintiff.

J. S. Newman, for the defendant.

UPTON v. STARR.

A county agent is not a *quasi* corporation.

A note was executed to *G.*, agent of *Wells* county, or his successor in office. &c. *Held*, that *G.*'s successor could not sue, in his own name, upon the note.

To a suit brought upon a promissory note given to a county agent, the defendant set up in bar of payment that it was given for a part of the purchase-money of a county-seat lot; that the agent sold the lot to the defendant for 100 dollars, of which sum he paid, at the time, 40 dollars, and executed his notes, that in suit being one, for the remaining 60 dollars: that said agent kept the 40 dollars, reported the sale to the county commissioners as having been made at 60 dollars, which report was accepted; and that the defendant had already paid with the said 40 dollars the amount of 60 dollars, at which sum the lot was reported as having been sold. *Held*, that these facts were no defense against the note.

Saturday,
November 27.

ERROR to the *Wells* Circuit Court.

PERKINS, J.—*Wentz*, (who has since been succeeded in office by *Starr*,) as successor in office to *James R. Greer*, commenced suit before a justice of the peace upon the following note:

"*Bluffton*, July 3d, 1839. Twelve months after date I promise to pay to *James R. Greer*, agent for *Wells* county, or his successor in office, or their order, the sum of 30 dollars for value received. *Samuel G. Upton*, [seal]."

Nov. Term,
1852.

UPTON
v.
STARR.

On appeal to the Circuit Court, *Wentz* obtained judgment.

The note was given for a part of the purchase-money of a county-seat lot owned by the county, and sold by her agent, *Greer*, to *Upton*.

Unless we can regard the county agent *quasi* a corporation, a successor in that office to *Greer*, the payee of the note, cannot sue on it. We think we cannot so regard him. We discover nothing in the statute that will authorize it; and section 17, R. S. p. 351, expressly enacts that, on the appointment of a successor to a county agent removed, should such removed agent fail to deliver to his successor moneys, notes, &c., in his hands, the county commissioners shall sue him on his bond in their corporate name, &c. See the cases of *Harper v. Ragan*, 2 Blackf. 39; *Johnson v. Harris*, 3 id. 387; *Morrow v. Seaman*, id. 338; *Ingersoll v. Cooper*, 5 id. 426; *Crawford v. Dean*, 6 id. 181.

Upton sets up in bar of payment of this note that it was given for a part of the purchase-money of a county-seat lot; that said *Greer*, as county agent, sold said lot to him, *Upton*, for 100 dollars, of which sum he paid, at the time, 40 dollars, executing his notes, that in suit being one, for the remaining 60 dollars; that *Greer* kept the 40 dollars, reported the sale to the county commissioners as having been made at 60 dollars, which report was accepted by said commissioners; and that he, *Upton*, has already paid, with the 40 dollars kept by *Greer*, the amount of 60 dollars, the sum at which the lot was reported as having been sold.

We think these facts constitute no bar. We think *Upton* is bound to pay the note in suit, and that *Greer* is bound to account to the county for the whole of the 100 dollars.

Nov. Term,
1852.

COVINGTON,
COAL-CREEK,
AND JACKSON-
VILLE PLANK-
ROAD COM-
PANY
V.
MOORE.

Per Curiam.—The judgment is reversed, with costs.
Cause remanded, &c.

J. Morrison and S. Major, for the plaintiff.

J. P. Greer, for the defendant.

THE COVINGTON, COAL-CREEK, AND JACKSONVILLE PLANK-
ROAD COMPANY v. MOORE.

To constitute a corporation under the general plank-road law of 1849, there must be—1. Articles of association setting forth the name of the corporation, the route and termini of the road, and the amount and number of shares of capital stock; and 2. An actual subscription of 1,500 dollars of stock per mile to said articles, subscribed with the names and places of residence of those who make the subscription; and 3. A filing of copies of said articles in the office of the recorder of each county into which the road extends.

A valid corporation may exist and a binding subscription of stock be made, under said law, before the appointment of directors; but the subscriptions cannot be collected till directors have been appointed—at least, except as to an amount to be paid at the time of subscribing to defray preliminary expenses, according to the articles or by-laws of the association.

The directors may properly be elected before the articles of association are filed in the recorder's office.

Semble, that if the directors were illegally elected, that could not be set up in resistance to the payment of stock-subscriptions, but would be a case for a *quo warranto* to oust the directors.

Saturday,
November 27.

ERROR to the *Fountain* Circuit Court.

PERKINS, J.—Assumpsit by the *Covington, Coal-Creek, and Jacksonville Plank-Road Company* against *Charles L. Moore* on a subscription of stock. The company is one organized under the general plank-road law of 1849. The payment of the subscription of stock is resisted on the ground that the law was not complied with in organizing the company. The question arises on a demurrer to the declaration. The Court below sustained the demurrer. The provisions of said law, so far as they bear upon the case before us, are as follows :

"Section 1. Be it enacted, &c., that any number of persons may form themselves into a corporation for the purpose of constructing and owning a plank-road by complying with the following requirements: They shall unite in articles of association setting forth the name which they assume; the line of the route and the places to and from which it is proposed to construct the road; the amount of capital stock and the number of shares into which it is to be divided. The names and places of residence of the subscribers, and the amount of stock taken by each shall be subscribed to said articles of association. Whenever the stock subscribed amounts to 1,500 dollars per mile of the proposed road, copies of the articles of association shall be filed in the office of the recorder of each county through which the road is to pass.

Nov. Term,
1852.

COVINGTON,
COAL-CREEK,
AND JACKSON-
VILLE PLANK-
ROAD COM-
PANY
V.
MOORE.

"Sec. 2. Not less than three nor more than seven directors shall be elected by the stockholders of every such corporation, who shall hold their offices for one year, and until their successors are in like manner elected. Notice of the first election for directors shall be given by two weekly publications in some newspaper printed on or near the route of the road."

"Sec. 21. Associations formed under the provisions of this act shall, from the time their articles are filed with the auditor aforesaid, be corporations," &c. (1).

"Sec. 15. Such company may make, enact, and publish any and all ordinances and by-laws which they may deem proper, not inconsistent with the laws of this state," &c.

Sec. 11. Provides that "it shall be lawful for the directors to require payment" of subscriptions of stock on thirty days' notice in a newspaper printed in, &c.

To constitute a corporation, then, under this act, there must be—

1. Articles of association setting forth the name of the corporation, the route and termini of the road, the amount and number of shares of capital stock; and,

2. An actual subscription of 1,500 dollars of stock per mile to said articles, subscribed with the names and

Nov. Term,
1852.

COVINGTON,
COAL-CREEK,
AND JACKSON-
VILLE PLANK-
ROAD COM-
PANY
v.
MOORE.

places of residence of those who make said subscription; and,

3. A filing of copies of said articles, in the office of the recorder of each county into which the road extends.

The declaration in the present case shows with sufficient certainty a compliance with all these requirements, and shows, therefore, the existence of a valid corporation and subscription of stock.

But a valid corporation and binding subscription of stock may exist without there being directors to the corporation; and instalments of stock must be called for by the directors in organizations under the general law. There must, therefore, be directors before subscriptions of stock can be collected. We do not mean to say that the articles or by-laws of the association might not provide for the payment of some amount, to defray preliminary expenses, on making a subscription. But the present suit is for no such sum. The declaration shows, in this case, that directors had been elected and a proper call for the instalment made before suit brought. But it is objected that said directors were elected before the articles of association were filed in the recorder's office, and this is insisted on as an irregularity. It is not denied that the directors were elected after stock to the amount of 1,500 dollars per mile had been subscribed. But when that sum had been obtained, both the filing of the articles and the election of directors might take place. The statute does not expressly declare which of the acts shall precede the other in performance, and we do not see how it can be important which shall do so, or whether they shall be performed concurrently. It is the same men acting for the same interest, and for the accomplishment of the same object in the one case as in the other. We do not see why the stockholders may not be transformed, by the filing of the articles, into a corporation with directors as well as without. And were the directors illegally elected even, it would seem, from the case of the *Newcastle and Andersonstown Turnpike Company v. Bell*, 8 Blackf. 584, that the fact could not be set up in resistance to payment of

subscriptions of stock, but would be a case for a *quo warranto* to oust the illegally elected directors.

Per Curiam.—The judgment is reversed with costs.
Cause remanded, &c.

D. Brier, for the plaintiffs.
L. Wallace, for the defendant.

(1) See General Laws 1849, p. 88.

Nov. Term,
1852.
TAYLOR
v.
WEBSTER.

TAYLOR v. WEBSTER.

The name given to an action, in a justice's Court, is, under the R. S. 1843, immaterial, and a statement of demand, though very informal, is sufficient.

ERROR to the *Tipppecanoe* Circuit Court.

BLACKFORD, J.—*Webster* sued *Taylor* in assumpsit before a justice of the peace.

Saturday,
November 27.

The statement of demand is as follows:

<i>Clinton Taylor</i> to <i>Asahel P. Webster</i> ,	Dr.
To one gelding horse,.....	\$75 00
Cr.....	10 00
Balance,.....	\$65 00

August 27th, 1849.

The justice gave judgment for the plaintiff, and the defendant appealed to the Circuit Court.

The cause was tried by the Circuit Court without a jury, and judgment rendered for the plaintiff for 70 dollars and 81 cents.

The material facts proved were as follows:

The horse in question being *Webster's*, was sold by one *Burgess* to *Taylor* for 10 dollars in money and a note for 65 dollars given by *R. A. Lockwood* to *Taylor*, which note *Taylor* indorsed in blank. The note was afterwards handed to one *Rockwell*, a clerk of *Webster's*, and *Rockwell* applied to *Lockwood's* agent, without success, for pay-

Nov. Term,
1852.

PEABODY
v.
SWEET.

ment of the note. The note was afterwards in *Webster's* possession.

Taylor, on the same day he bought the horse as aforesaid, or the next day, sold him to a traveler for 75 dollars.

There was no proof that *Burgess* was authorized by *Webster* to make the sale of the horse to *Taylor*. It is contended, however, that *Webster* afterwards ratified the sale. The only evidence on the subject is that which we have already mentioned. The Court, sitting as a jury, might have inferred from the facts proved that *Webster* knew of said sale to *Taylor*, and had assented to it; but the Court might also have inferred the contrary, which it must be presumed they did, as they found for the plaintiff. This is one of those cases in which, we think, this Court ought not to interfere with the verdict.

Considering, therefore, that the horse, at the time *Taylor* sold him, was *Webster's* property, *Taylor* must be liable to *Webster* for the value of the horse.

The suit having been commenced in a justice's Court, the name given to the action is immaterial; and the statement of demand, though very informal, is sufficient. R. S. 871.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages, and costs.

R. Jones, for the plaintiff.

J. Pettit and *S. A. Huff*, for the defendant.

PEABODY and Others v. SWEET.

The Circuit Court, upon an appeal from an order of the board of county commissioners establishing a change of a certain road in the county, set aside the report of the viewers; but no bill of exceptions was then taken, nor did it appear on what ground the report was set aside. *Held*, that it must, therefore, be presumed to have been done correctly.

The board of commissioners, upon application and the report of viewers, made an order establishing a change of a road in the county. On appeal, the Circuit Court dismissed the suit. There was no proof that, before the application for the appointment of viewers, the public had been notified of the application, as required by the R. S. 1843, either by posting up notices thereof in three public places for at least twenty days, or by publishing the notice in a newspaper of the county. *Held*, that the want of such proof was a sufficient reason for dismissing the suit.

Nov. Term,
1852.

PEABODY
v.
SWEET.

ERROR to the *Noble* Circuit Court.

Saturday,
November 27.

BLACKFORD, J.—This was a case of a petition to the board of county commissioners of *Noble* county, filed at the *June* term of the board in 1845. The object of the petition was to obtain a change of a certain road situate in said county. The board, upon the filing of the petition, appointed three persons to view the road, and report their proceedings to the then next term.

At the next term of the board, to-wit, at the *September* term, 1845, a majority of the viewers reported in favor of the proposed change of the road. At the same term, a remonstrance against the change was filed with the board, and three other persons were thereupon appointed to review the road, and report to the next term.

At the next term of the board, to-wit, at the *December* term, 1845, the said reviewers reported that the proposed change of the road was practicable and of public utility, but that it was not expedient. The board thereupon ordered the change to be made, and that the persons remonstrating should pay the costs.

Jerome Sweet, one of those who had signed the remonstrance, appealed to the Circuit Court.

At the *March* term, 1846, of the Circuit Court, the report of the reviewers, made at the *December* term, 1845, of the board of commissioners, was set aside with costs to the appellant, and the cause remanded to the board for further proceedings.

The board of commissioners at the *December* term, 1846, again appointed persons to review said road. These reviewers, at the next term of the board, reported in favor of the change of the road; and the board thereupon ordered the change to be made.

Nov. Term,
1852.

PEABODY
v.
SWEET.

The said *Sweet* again appealed to the Circuit Court.

At the trial in the Circuit Court at the *September* term, 1848, on this second appeal, the petitioners gave in evidence the original petition filed with the board of commissioners in 1845, and the report of the reviewers made to the board in 1847. There was no other evidence.

The Circuit Court dismissed the suit at the costs of the petitioners.

The first objection made to these proceedings is, that the Circuit Court, at the *September* term, 1846, set aside the report of the reviewers made at the *December* term, 1845, of the board of commissioners. There was no bill of exceptions taken on that occasion, and we are not informed of the ground upon which the Court acted. We must presume, therefore, that the report was rightly set aside.

The other objection is, that the Circuit Court erred, at the *September* term, 1848, in dismissing the suit. It was necessary, under the statute, before applying to the board for the appointment of viewers of the road, to notify the public of the application, either by posting up notices thereof in three public places for at least twenty days, or by publishing the notice in a newspaper of the county. R. S. pp. 331, 327. In the present case there was no proof of any notice whatever of the application; and the want of such proof was a sufficient reason for dismissing the suit.

Per Curiam.—The judgment is affirmed with costs.

H. Cooper, for the plaintiffs.

W. M. Clapp, for the defendant.

SMOOT v. DYE.

Nov. Term,
1852.SMOOT
v.
DYE.

A. sold to B. a judgment, B. agreeing to discharge a debt of A. to C. in part payment. C. assented to the arrangement, released A., and afterwards recovered a judgment against B., in his own name, for the debt. A. afterwards sued B. for the identical money which B. had thus agreed to pay C. Held, that the suit would not lie.

ERROR to the *Delaware* Circuit Court.

Tuesday,
November 23.

Assumpsit by *Dye* against *Smoot* for an alleged unpaid balance upon the sale of a judgment. Recovery by the plaintiff. The case turns upon the evidence. The point will be understood from the following statement:

Dye sold a judgment to *Smoot*, received a certain amount in payment, and required *Smoot*, in addition to said amount, to pay a certain fee claimed by *Jeremiah Smith*. *Smoot* agreed to pay said fee to *Smith*. Failing to do it with sufficient promptness, *Smith* sued him in his (*Smith's*) name, in assumpsit, for said fee, and recovered below. *Smoot* brought that case to this Court, where the judgment below was affirmed on the ground that the evidence showed that *Dye* had released and *Smith* accepted *Smoot* for the debt in question; and that, therefore, *Smith* could recover it of *Smoot* in his own name.

This suit is now prosecuted by *Dye*, in his name, to recover from *Smoot* the sum that had been transferred to and recovered by *Smith*. Regarding the arrangement between *Dye*, *Smoot*, and *Smith*, as a transfer of *Dye's* claim on *Smoot* to *Smith*, by the concurrence of the three, *Dye* possesses no legal right to sue in this case, and, the money having been once recovered by *Smith*, it is surely unjust that it should be again recovered by *Dye*. On this point we reverse the case upon the evidence.

The judgment is reversed with costs. Cause remanded, &c.

D. Kilgore and *T. J. Sample*, for the plaintiff.

J. S. Buckles and *W. March*, for the defendant.

Nov. Term,
1852.

BROWN v. BROOKS.

BROWN
v.
BROOKS.

The refusal of the Circuit Court to give to the jury an instruction asked for, when the Court gave in its stead an equivalent one, is not a ground for reversing the judgment.

In an action of slander the Court instructed the jury, in effect, that if the words charged were spoken under excitement, and afterwards taken back, that fact should be considered in mitigation of damages; but if they were thus spoken and afterwards persisted in, it should not be so considered. The Court afterwards added, that if the charge was made under excitement it might be considered in mitigation. *Held*, that the instruction, thus modified, could not be complained of by the defendant.

Tuesday,
November 30.

ERROR to the *Wayne* Circuit Court.

PERKINS, J.—Case for slander. Charge complained of as having been made, larceny.

Pleas, the general issue and justification. Issues of fact. Trial by jury, and verdict and judgment for the plaintiff.

The evidence is not upon the record.

A bill of exceptions states that upon the close of the evidence, the Court, in their general instructions in the case, charged the jury that if the words alleged in the declaration were spoken in excitement, and afterwards taken back, it should be considered in mitigation of damages; but if they were spoken under excitement, and afterwards persisted in, it should not be so considered; whereupon the defendant asked the Court to say to the jury that if the charge was made under excitement and the defendant did not take it back, or offer to do so, the jury should consider it in mitigation of damages, which the Court refused, but instructed the jury that if the charge was made under excitement it might be considered in mitigation.

This bill of exceptions presents all the questions raised in the cause.

The last instruction given by the Court is substantially the same as that asked by counsel and refused by the Court. The refusal of that instruction, therefore, cannot, in any event, be made a ground for reversing the judgment below; and, we think, the first instruction, above set

out, the only matter that can be a source of complaint to the plaintiff in error. We will consider it.

Nov. Term,
1852.

BROWN
v.
BROOKS.

The allegation of malice in speaking the words is a material one in a declaration for slander. And when the plaintiff has, *prima facie*, established that allegation upon the trial, the defendant has a right, under the general issue, to give in evidence, to mitigate the damages, matters disproving, or tending to disprove, malice; such as insanity, or that the words were spoken in a sudden heat of passion, or upon a justifiable occasion, or that there was a general belief, on the part of the public, of the truth of the matters charged, &c. In answer to such evidence on the part of the defendant, and to prevent the reduction of damages, the plaintiff may produce evidence showing, or tending to show, express malice. Applying these principles to the present case, the defendant below may have shown, as tending to disprove malice, that he spoke the words in a state of excitement, and the plaintiff, in reply, as tending to destroy the force of that evidence, and show actual malice, may have proved that the defendant persisted in repeating the charge after the excitement had passed off. For though anger may exist without malice, and words, therefore, be spoken in the heat of passion without malice; yet malice may co-exist with anger, and words be spoken with malice, even in the heat of passion; and whether they are or are not so spoken, in any given case, is a question for the jury, all the circumstances of that case being considered. It would not necessarily follow that, because words were spoken in the heat of passion, malice was wanting, and damages should be mitigated. Nor would it necessarily follow, because a charge made in the heat of passion was coolly and deliberately repeated afterwards, that the charge was maliciously made in the heat of passion, and subject to heavy damages. These would be questions for the jury. Each repetition of slanderous words lays the foundation for a separate suit. Some of the repetitions may be with malice, and some without. Each case must stand or fall by itself. In the case before us, therefore, should we consi-

Nov. Term,
1852.

BROWN
v.
BROOKS.

der, as is insisted, that the Court told the jury the damages should be mitigated if the words were spoken in excitement, but should not be if they were repeated afterwards without excitement, irrespective of the question of malice, the charge was wrong, and may have injured the plaintiff in error. But we do not so consider the charge. We think the jury would have understood from what the Court said, taken all together, that if the words, for the speaking of which the action was brought, were spoken under excitement, the fact of that excitement should be considered in mitigation of damages; but if they were spoken not under excitement, then there would be no fact in relation to excitement to take into consideration in mitigation, and this would certainly be true.

Other proper instructions in relation to malice may have been given; though it does not appear that any such were asked.

We may remark that we think the word "excitement" one of too general a signification to be used without qualification in the connection in which it was employed in this case. There are many kinds of excitement, some of which might not even tend to mitigate slander. But we presume the evidence in the cause established that degree of passion that justified the charge. At all events, if it did not, the error was in the complaining party's favor.

Per Curiam.—The judgment is affirmed with 1 *per cent.* damages and costs.

C. H. Test, for the plaintiff.

J. S. Newman, for the defendant.

KIRKPATRICK v. THE STATE on the Relation of KIRKPATRICK.

Nov. Term,
1852.KIRKPATRICK
v.
THE STATE.

Suit upon an administrator's bond given for the faithful application of the proceeds of real estate of the intestate which the administrator had procured an order to sell. Plea, *nil debet*, and issue on the plea. *Held*, that the plea was not a nullity. *Held*, also, that it was incumbent upon the relator, under the issue, to prove all the material averments in the declaration except the execution of the bond.

ERROR to the *Kosciusko* Probate Court.Friday,
December 3.

SMITH, J.—This was a suit brought by the defendant in error on a bond executed by the plaintiff in error as administrator of the estate of one *Mary Timmons*, deceased, for the faithful application of the proceeds of certain real estate of the decedent, (for the sale of which he had procured an order of the Probate Court,) "in pursuance of law and the order of said Court in the premises."

The breach averred is, that said administrator did not faithfully apply the proceeds of said real estate according to law and the order of said Court; for that 288 dollars came to his hands from the sale of said real estate, and afterwards, on the 13th of *November*, 1844, said Court ordered him to pay to the relator, who was an heir at law and distributee of said estate, 130 dollars and 34 cents as his share of the proceeds of said sale; and though the relator did on said day last named specifically demand said sum of said administrator, the latter did not and would not pay the same, &c.

The defendant below pleaded the general issue, and several special pleas upon which issues were taken. The cause went to the jury upon the evidence, and the plaintiff had judgment for the amount claimed by him.

The plaintiff only proved that a special demand was made of the administrator, and some facts relative to the matters averred in the special pleas.

This proof was not sufficient to entitle him to a verdict. The plea of *nil debet*, though bad on general demurrer, was not a nullity. *Tate v. Wymond*, 7 Blackf. 240. As the plaintiff took issue upon it, he should have proved all

Nov. Term,
1852.

GORE
v.
GORE.

the material allegations in his declaration except the execution of the bond.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. H. Bradley and A. A. Hammond, for the plaintiff.

GORE v. GORE and Another.

The rule that objections to evidence should be shown by the bill of exceptions, refers to cases in which the testimony has been admitted, and not to those in which it has been rejected.

Friday,
December 3.

ERROR to the *De Kalb* Circuit Court.

SMITH, J.—*Maria Gore* filed a petition in the Probate Court of *De Kalb* county, alleging that she is the widow of *Eldah Gore*, deceased, by whom she had one child, who is also deceased, and of whom she is, consequently, the heir at law. It is further alleged that before the death of *Eldah Gore*, his father, *John Gore*, died seized of certain real estate, and leaving the said *Eldah* and two others, namely, *Rufus Gore* and *Anna Gore*, his heirs, who each became entitled to one undivided third part of said real estate. The petitioner demanded to have the portion of said *Eldah* set off to her.

Rufus and *Anna Gore* filed a plea alleging that *John Gore*, in his life-time, gave *Eldah Gore* one hundred acres of land and some personal property as an advancement, and as his full share of *John Gore's* estate.

Upon the hearing the Probate Court rendered a judgment partitioning the land equally, between the petitioner and the two defendants.

It appears by a bill of exceptions that the defendants offered in evidence a deed from *John Gore* to *Eldah Gore*, conveying to the latter fifty acres of land, and then introduced witnesses to prove that the consideration named

in the deed was merely a nominal one, and that the land was really given to *Eldah* as an advancement. This evidence was rejected by the Probate Court on the motion of the plaintiff's counsel. Some other parol testimony strongly tending to prove that *John Gore*, during his lifetime, conveyed fifty acres of land to *Eldah Gore* as an advancement, was then offered and excluded.

Nov. Term,
1852.

GORE
v.
GORE.

The defendants prosecuted a writ of error in the *De Kalb* Circuit Court, where the judgment was reversed and the cause remanded for further proceedings.

A writ of error is now prosecuted from that decision of the *De Kalb* Circuit Court to this Court, under the act of 1850, p. 65.

The Circuit Court reversed the judgment upon the ground that the evidence excluded should have been admitted, and it is now said the Circuit Court erred in reversing for that cause, because the bill of exceptions does not state the objections made to the evidence, and it must therefore be presumed they were sufficient.

The rule that the objections to evidence should be shown by the bill of exceptions, upon which the plaintiff in error relies, refers to cases in which testimony has been admitted, and not to cases in which it has been rejected. The evidence offered in this case was admissible if no objection was shown, and from all that appears it should have been admitted. We think the decision of the Circuit Court is correct.

Per Curiam.—The judgment is affirmed with costs.

E. A. McMahon, for the plaintiff.

J. B. Howe, for the defendants.

Nov. Term,
1852.

BOWMAN
v.
THE STATE.

BOWMAN and Another v. THE STATE on the Relation of STEWART.

Debt by *The State* on the relation of *S.*, the clerk of the *Carroll* Circuit Court upon a sealed note made payable to *W. C.*, school commissioner, or to his successor in office, and given to secure a loan of funds belonging to congressional township No. 26, &c., in *Carroll* county. By an act of 1844 the office of auditor in said county was abolished and its duties transferred to the clerk of the *Carroll* Circuit Court. By an act of 1849 the office of school commissioner was abolished and its duties transferred to the auditor and treasurer. *Held*, that by the act of 1844 the clerk of the *Carroll* Circuit Court became *ex officio* the auditor of said county, and it was his duty to bring the present suit; but, *held*, that, under the R. S. 1843, it should have been brought in the name of the payee of the note.

Friday,
December 3.

ERROR to the *Carroll* Circuit Court.

SMITH, J.—Debt by *The State* on the relation of *Stewart*, clerk of the *Carroll* Circuit Court, against the plaintiffs in error upon the following sealed note :

“Five years after date, we, or either of us, promise to pay to *William Crook*, school commissioner, or to his successor in office, two hundred and twenty-five dollars, with interest thereon, payable annually in advance, at the rate of eight *per cent. per annum*, it being of funds belonging to congressional township No. 26 north, of range 2 west, in *Carroll* county. Value received. Witness, our hands this 24th day of *August*, 1842.”

There are four counts, all of a similar character. General demurrer to each count and judgment for the plaintiff.

The plaintiffs in error contend that the suit is not rightly brought in the name of the state on the relation of the clerk of the *Carroll* Circuit Court, and we think their objection is well taken.

It is provided by s. 108, c. 13, R. S., that for all moneys due the congressional township fund, remaining unpaid, the county auditor shall cause suits to be instituted in the name of the obligee or payee of the instrument sued on, and the money recovered to be paid to the school commissioner of his county, &c.

The office of auditor in *Carroll* county was abolished by an act dated *January* 13th, 1844, (p. 48), and its duties transferred to the clerk of the Circuit Court. By the act of *January* 17th, 1849, (p. 124), the office of school commissioner is abolished and its duties transferred to the auditor and treasurer.

Nov. Term,
1852.

WALKER
v.
CLYMER.

The clerk of the *Carroll* Circuit Court may, in consequence of the act of *January* 13th, 1844, be considered as *ex officio* the auditor of that county, and it was his duty to cause the suit to be brought, but it was unnecessary to make the state a party. It should have been brought in the name of the payee of the note. See *Thompson v. Weaver*, 7 Blackf. 552.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. H. Evans, for the plaintiff.

D. D. Pratt and *H. Allen*, for the defendant.

WALKER, Executor, v. CLYMER.

To sustain a set-off for money paid as a replevin-bail, proof must be made of the entry of replevin-bail.

ERROR to the *Cass* Circuit Court.

Friday,
December 3.

SMITH, J.—This was an action of assumpsit, brought by the defendant in error against *Walker*, as the executor of *Joseph Clymer*, deceased. The first count was upon a note made by *Joseph Clymer*, during his life-time, for 180 dollars and 60 cents. The second count was for goods sold and work and labor. The defendant pleaded the general issue, with notice of matters of set-off, and several other pleas of payment, want of consideration, &c. The cause was submitted to the Court who rendered a judgment in favor of the plaintiff for 346 dollars and 82 cents damages; but because the suit was not brought,

Nov. Term,
1852.

WALKER
v.
CLYMER.

nor notice of the claim given to the executor, within one year from the issuing of his letters testamentary, the defendant had judgment for the costs.

There were issues of fact upon all the pleas, except the seventh, eighth, and ninth, to which demurrers were sustained. The seventh and eighth pleas are evidently bad, and it is unnecessary to examine the ninth, as that was only to the costs of the suit, and the plaintiff did not succeed in obtaining a judgment for costs.

The only question presented is, whether the evidence supports the judgment, and we cannot say it does not, as setting out of view all the evidence offered under the common counts, the judgment is not for a greater amount than that of the note described in the first count and the interest which had accrued upon it.

The only matter of set-off which the defendant below attempted to prove, was the payment of a certain judgment which had been rendered against the plaintiff below, by *Joseph Clymer*, during his life-time, as replevin-bail. There was, however, no proof of the entry of replevin-bail.

The defendant gave in evidence a judgment which had been rendered against the plaintiff in favor of one *William George*, and then offered certain receipts, given by the attorneys of *George* to *Joseph Clymer*, acknowledging the payment of said judgment by him as replevin-bail. The execution of these receipts was duly proved, but the Court refused to permit them to be given in evidence. The reason why they were excluded is not stated in the record. It may have been for the reason that there was no proof of the entry of replevin-bail.

Per Curiam.—The judgment is affirmed with 2 per cent. damages and costs.

O. H. Smith, W. Z. Stuart, and S. Yandes, for the plaintiff.

D. D. Pratt, for the defendant.

CLINE v. LOWE and Others.

Nov. Term,
1852.CLINE
v.
LOWE.

Bill in chancery by a replevin-bail to enjoin the proceedings upon an execution issued on the judgment and levied upon his property, on the ground that a prior execution issued on the judgment had been levied on property of the principal, a bond for the delivery of the property forfeited, and a judgment recovered against the principal and surety on the bond upon which an execution had been issued and a part of the judgment collected but not credited. *Held*, that the remedy, if any, was by a motion to set aside the execution.

APPEAL from the *Hendricks* Circuit Court.

Friday,
December 3.

SMITH, J.—This was a bill in chancery to enjoin the proceedings upon an execution which had been levied on property of the complainant. The bill was dismissed upon demurrer.

The bill charges that the defendants had, in *December*, 1841, obtained a judgment at law, against one *Dickens*, upon which the complainant became replevin-bail; that in, 1842, an execution issued on said judgment was levied on property of *Dickens* of the value of 600 dollars; that said property remained unsold for want of bidders; that a *venditioni exponas* issued which was returned without making sale, because *Dickens* had failed to deliver the property; that the defendants caused another execution to be issued, and directed it to be returned without further proceedings, because they had obtained, in the mean time, a judgment upon a bond executed by *Dickens* and one *Strange*, for the delivery of the property before mentioned; that the defendants had made 80 dollars by an execution issued upon the judgment last mentioned, which sum they had not credited; and, finally, that they had caused another execution to be issued and levied on property of the complainant of great value, which they were proceeding to sell, &c.

We think it clear that the demurrer to this bill was correctly sustained. If the facts charged to have occurred afford any ground for setting aside the execution last issued, the proper remedy of the complainant was to have made a motion in the Circuit Court for that purpose.

Nov. Term,
1852.

HUTCHENS
v.
DOE.

Per Curiam.—The decree is affirmed with costs.
C. C. Nave, for the appellant.
J. S. Harvey and J. M. Gregg, for the appellees.

3 528
138 534

HUTCHENS v. DOE on the Demise of SMITH.

In ejectment to recover the possession of land sold to the plaintiff's lessor upon execution, he was permitted by the Court at the trial to amend the executions upon which the land was sold to him. The record did not show what the amendments were. *Held*, that it must be presumed they were such as might properly have been allowed.

Clerical mistakes made in the issuing of an execution may be amended by the judgment.

A sale to an execution-plaintiff will be avoided by the reversal of the judgment as respects the costs of the suit.

Friday,
December 3.

ERROR to the *Randolph* Circuit Court.

SMITH, J.—This was an action of ejectment by the defendant in error against the plaintiff in error.

The plaintiff's lessor claimed title by virtue of a sale of the premises in controversy to satisfy two executions, he being the purchaser. The executions had been issued on judgments which he himself had obtained against the plaintiff in error. One of the judgments was for 27 dollars and the costs of the suit.

The first error assigned is, that the Court permitted the plaintiff's lessor to amend the executions before offering them in evidence. The record does not show what amendments were made, and we must presume they were such as might properly be allowed. Clerical mistakes made in the issuing of an execution may be amended by the judgment. *Doe d. Wilkins v. Rue*, 4 Blackf. 263.

It was proved that after the sale one of the judgments, so far as respects the costs of suit, had been reversed by this Court, and it is contended that as the sale was made for the payment of those costs as well as the valid por-

tions of the judgments, and the purchaser was the execution-plaintiff, he acquired no title to the premises.

Nov. Term,
1852.

We think this position is correct. The statute concerning sales on execution, provides that where any real estate shall have been sold by virtue of a judgment afterwards reversed, and the purchaser is a party to the record, or attorney of any party thereto, the reversal shall have the effect to avoid such sale. R. S. c. 29, ss. 17-24.

THE STATE
v.
BLACKWELL.

If, therefore, the entire judgments under which this land was sold had been reversed, there can be no doubt that such reversal would have had the effect to render the sale invalid, and we think the reversal of a portion of one of the judgments produces a similar result. The execution-plaintiff caused the land to be sold for a greater amount than he had a right to make by virtue of his executions, and as he is not a *bona fide* purchaser without notice, he can take nothing by his purchase.

It has been heretofore decided by this Court that a sale of land for taxes is not valid unless the land was liable for *all* the taxes for which it was sold. *McQuilken v. Doe*, 8 Blackf. 581. We think the cases are analogous.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. Perry, for the plaintiff.

J. Smith, for the defendant.

THE STATE v. BLACKWELL.

An indictment charged that *A. B.*, on, &c., at, &c., with force and arms broke and entered in and upon the close and land of *C. D.*, there situate, (describing it,) and then and there took and removed from said land a portion of the timber of a poplar tree, which timber, so removed by said *B.*, was of the value, &c., without license, &c. *Held*, that the indictment was not defective for not alleging that said portion of said tree was "then and there" of the value stated.

ERROR to the *Ripley* Circuit Court.

VOL. III.—67

Wednesday,
December 15.

• NOV. TERM,
1852.
THE STATE
V.
HUBBARD.

PERKINS, J.—At the *September* term, 1850, of the *Ripley* Circuit Court, the grand jurors for said *Ripley* county returned into Court the following bill:

“The grand jurors,” &c., “upon their oath, present that *James H. Blackwell*, on the first day of *February*, in the year eighteen hundred and fifty, at the county of *Ripley* aforesaid, with force and arms, broke and entered in and upon the close and land of one *John F. Acton* there situate, to-wit, the north-west, &c., and then and there took and removed from said land a portion of the timber of one poplar tree, which timber so removed by said *Blackwell* was of the value of 10 dollars, without license,” &c.

This indictment was founded upon the 72d section, p. 975, of the R. S., and was objected to below because it omitted the words “then and there,” in stating the value of said timber. It was insisted that the indictment should show the value of the timber at the time it was removed. It was quashed.

We think this indictment does so with sufficient certainty. It alleges that the timber was removed on a certain day, and was worth 10 dollars. That statement we understand clearly enough to be that it was worth 10 dollars when it was removed.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. Wallace, for the state.

J. Ryman, for the defendant.

THE STATE v. HUBBARD.

An indictment for keeping a gaming-house was held not to be bad for charging that the defendant kept a house instead of his house to be used for gaming, the latter term being employed by the statute defining the offense.

Wednesday,
December 15.

ERROR to the *Bartholomew* Circuit Court.

PERKINS, J.—Indictment against *John C. Hubbard* for keeping a gaming-house. Nov. Term,
1852.

The indictment charges that the defendant, during a certain space of time, kept a house to be used for gaming, &c. THE STATE
v.
STALLINGS.

The statute (R. S. p. 981, s. 100) enacts that if any person shall keep his house to be used, &c. The indictment was quashed below because the article *a* instead of the pronoun *his* was used in it in designating the house kept for gaming.

We think that during the time the defendant kept a house, said house was, in contemplation of the enactment in question, his house, and that the indictment is, therefore, sufficiently certain.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

D. S. Gooding and *N. T. Hauser*, for the state.

THE STATE v. STALLINGS.

Indictment for gaming, containing two counts; the first for money won and the second for money lost at a bet upon the result of a game of cards played by the defendant and others. The indictment did not state whether the bet was made with the persons played with, or with a third person. *Held*, that the indictment was bad.

ERROR to the *Poscy* Circuit Court.

*Wednesday,
December 1.*

PERKINS, J.—Indictment for gaming. Indictment quashed in the Circuit Court. It presents, in one count, that *Andrew Stallings*, late, &c., on, &c., at, &c., did unlawfully win in a bet made at a game of cards played by said *Stallings* and others, some named and some unknown, the sum of 10 cents.

The second count charges that he lost said sum in a bet made at a game of cards played by, &c.

The indictment does not show whether the bet was

Nov. Term, 1852. — made with the persons played with, or with some third person, a spectator of the game, and is bad for uncertainty.

MALONE

v.

McCLAIN.

Per Curiam.—The judgment is affirmed.

A. J. Robinson, for the state.

J. Pitcher, for the defendant.

MALONE v. McCLAIN and Another.

Debt upon an appeal-bond. The condition of the bond was as follows: That whereas *M.* had, on the day of executing the bond, obtained an appeal from the judgment of the *Hendricks* Circuit Court on said day rendered against him in a case wherein *John Doe*, on the demise, &c., was plaintiff, and said *M.* was defendant; now should said *M.* duly prosecute his said appeal and pay any judgment or costs which might be rendered or affirmed against him, then the bond was to be void. The first breach assigned was, that said *M.* did not duly prosecute his appeal from the judgment of said Court in said suit, &c., against him, according to the condition of said bond, but therein wholly failed. *Held*, that the breach was bad. The second breach, after alleging, as in the first, that the appeal had not been duly prosecuted, averred that the appeal was dismissed by the Supreme Court on, &c., whereby the plaintiff was kept out of the occupation of 160 acres of land, the rent of which was worth, &c. *Held*, that the plaintiff's claim for rents and profits was not provided for by the condition of the bond, and that the breach was bad. The third breach, after alleging, as in the first, that the appeal-bond had not been duly prosecuted, averred that the appellant had not paid the judgment and costs which were adjudged against him on, &c., by the Supreme Court for — dollars and — cents, according to the condition of said bond, but therein wholly failed, to the plaintiff's damage, &c. *Held*, that, were there no other objection to the breach than its omitting to state the amount of said judgment, this omission would show it to be insufficient.

Wednesday,
December 15.

ERROR to the *Hendricks* Circuit Court.

BLACKFORD, J.—The plaintiff in error brought an action of debt against the defendants in error on an appeal-bond. The declaration sets out the condition of the bond, and assigns three breaches. General demurrer to each breach, and the demurrers sustained. Final judgment for the defendants.

The condition of the bond is as follows:

That whereas the said *McClain* has this day obtained an appeal from the judgment of the *Hendricks* Circuit Court this day rendered against him, in a case wherein *John Doe*, on the demise of *Isaac Malone*, was plaintiff, and said *McClain* was defendant, now should said *McClain* duly prosecute his said appeal, and pay any judgment or costs which may be rendered or affirmed against him, then this obligation to be void.

Nov. Term,
1852.

MALONE
v.
McCLAIN.

The defendants, therefore, were bound by the bond (if the appeal failed) to pay the judgment appealed from, and such judgment for damages and costs as the Supreme Court might render, in the case, against the appellant.

The first breach assigned is as follows: That said *McClain* did not duly prosecute his appeal from the judgment of said Court in said suit of *John Doe*, on the demise of *Isaac Malone*, against him, according to the condition of said bond, but therein wholly failed.

This breach is clearly bad. What was recovered by the judgment appealed from is not stated in the condition of the bond, nor is it shown by an averment. Neither does it appear that any judgment against the appellant was rendered by the Supreme Court. Suppose the contingency (the failure of the appeal) on which the defendants' liability depended is shown, with sufficient certainty, to have happened, the amount of that liability is not stated.

Mr. *Chitty* gives a precedent of a declaration on a recognizance of bail in error. The recognizance, and the condition, are first set out (the condition reciting the amount, &c., of the judgment below, and the issuing of the writ of error); then comes the judgment of affirmance by the Court above with the judgment for damages and costs for the delay occasioned by the writ of error; and, lastly, there is an averment of the non-payment of the judgment of the Court below or of that of the Court above. 2 *Chitty's Pleadings*, 479.

The first breach now before us, tested by this precedent,

Nov. Term, (changing what is necessary to be changed,) is very defective.
1852.

MALONE
v.
McCLAIN.

The second breach, after alleging, as in the first, that the appeal had not been duly prosecuted, avers that the appeal was dismissed by the Supreme Court on the 29th of *November*, 1850; whereby said *Malone* was kept out of the occupation of 160 acres of land, the rent of which was worth 150 dollars.

Supposing this breach to show (which was evidently its object) the plaintiff's right to certain rents and profits, of which the appeal had deprived him, they are not recoverable in this action. The statute on the subject is as follows: "When any appeal is taken to the Supreme Court from a judgment in waste, or for the recovery of land, or the possession thereof, the condition of the appeal-bond, in addition to the matters hereinbefore prescribed, shall further provide that the appellant shall also pay and satisfy all damages which may be sustained by the appellee for the mesne profits of the premises recovered, or for any waste committed thereon, as well before as during the pendency of such appeal." R. S. p. 633. There being no such additional provision in the condition of the bond now sued on, the plaintiff's claim for rents and profits is not provided for by the condition.

This second breach, it may be observed in passing, is silent as to any judgment for money against *McClain* either by the Circuit or Supreme Court.

The third breach, after alleging, as in the first, that the appeal-bond had not been duly prosecuted, avers that the appellant had not paid the judgment and costs which were adjudged against him on the 29th of *November*, 1850, by the Supreme Court, for — dollars and — cents, according to the condition of said bond, but therein wholly failed; to the plaintiff's damage 100 dollars.

This third breach relies on the defendants' non-payment of a judgment of the Supreme Court against the appellant; but it omits to state the amount of that judgment. Were there no other objection to the breach, this omission would show it to be insufficient.

Per Curiam.—The judgment is affirmed, with costs.

C. C. Nave, for the plaintiff.

H. Brown and I. Brown, for the defendants.

Nov. Term,
1852.

MARKLE
v.
THE STATE.

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MARKLE v. THE STATE.

A count in an indictment on the statute relative to lotteries was substantially as follows: That the defendant, on, &c., at, &c., unlawfully made a certain lottery for a division of *property* to be determined by chance, the making of which not being authorized by law, contrary to the statute. *Held*, that the indictment was bad, after judgment, for not stating the species of property.

It is a general rule that whatever is essential to the gravamen of the indictment must be set out particularly.

ERROR to the *Vermillion* Circuit Court.

Wednesday,
December 15.

BLACKFORD, J.—This was an indictment on the statute relative to lotteries.

The indictment contains three counts. Plea, not guilty. The cause was tried by the Court, and judgment rendered for the state.

The error assigned is, that the indictment does not describe the offense with sufficient certainty.

The first count is substantially as follows: That the defendant, on, &c., at, &c., unlawfully made a certain lottery for a division of property to be determined by chance, the making of which not being authorized by law, contrary to the statute.

The statute is as follows: If any person or persons shall sell any lottery ticket, or share in any lottery or scheme for a division of property, to be determined by chance, or shall make or draw any lottery or scheme for a division of property as aforesaid, not authorized by law, such person or persons, on conviction thereof, shall be fined, &c. R. S. p. 982.

As the making of a lottery is not against the statute, unless the lottery be for a division of property, that ob-

Nov. Term, 1852.
 MARKLE
 v.
 THE STATE.

ject must be described; and it seems to be essential to the description that the property should be pointed out. It ought, at least, to appear whether real property, or whether money or other personal property, was the subject-matter of the lottery. An indictment for stealing goods must particularize the goods alleged to have been stolen. An indictment for obtaining goods by false pretences must set forth the false pretences and describe the goods. An indictment for gaming must show whether the game was with cards, dice, &c. These cases appear to be analogous to the one before us. It is a general rule that whatever is essential to the gravamen of the indictment must be set out particularly; and we think that, according to that rule, the property in this case should have been described. Besides, the word property being a generic term, the species of property, as land, goods, &c., should have been stated. It has been held that an indictment on the statute against maliciously killing cattle, must not charge the defendant with killing cattle generally, but that the species of cattle, as horse, cow, &c., must be stated. *Rex v. Chalkley*, Russell & Ryan's Rep. 258: There seems to be as much reason for stating the kind of property in the present case as the kind of cattle in the case last cited.

The objection which we have noticed as showing the first count to be bad, is applicable to the second and third counts.

Per Curiam.—The judgment is reversed. Cause remanded, with instructions to the Circuit Court to render judgment for the defendant.

H. D. Scott, for the plaintiff.

C. Cruft, for the state.

DALLAS v. HOLLINGSWORTH.

Nov. Term,
1852.DALLAS
v.
HOLLINGS-
WORTH.3 537
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A., a minor, contracted with *B.* to work six months for *B.* at 10 dollars a month; and if he failed to work out the time he was to receive no pay. Having worked for *B.* about three months, he left *B.* without assigning any reason therefor, and being yet a minor, sued *B.* for his labor during said period at 13 dollars a month. *Held*, that the contract was a voidable one. *Held*, also, that *A.* having avoided it by leaving *B.*'s service and commencing the suit, the suit was sustainable for the value of his labor.

ERROR to the *Vermillion* Circuit Court.

Wednesday,
December 15.

BLACKFORD, J.—*Hollingsworth*, a minor, by his next friend, sued *Dallas* in assumpsit before a justice of the peace.

The suit was brought for work and labor from the 26th of *March*, 1850, to the 26th of *June*, 1850, at 13 dollars a month. Demand, 39 dollars.

The defendant filed an account against the plaintiff for 3 dollars and 47 cents.

Verdict and judgment for the plaintiff for 25 dollars and 87 cents. The defendant appealed to the Circuit Court.

The cause was submitted to the Circuit Court without a jury, and judgment rendered for the plaintiff for 24 dollars and 22 cents, with costs.

The defendant brings the case to this Court.

The facts are substantially as follows:

The plaintiff and defendant entered into a contract, by which the former was to work six months for the latter at 10 dollars a month. The plaintiff was to work out the time or have no pay. He worked for the defendant, under the contract, from the 26th of *March*, 1850, till the 21st of *June* of the same year, and then left him without assigning any reason therefor. The plaintiff was a minor when he made the contract, and was still so at the commencement of the suit. The defendant had paid the plaintiff, on account of the work, 3 dollars and 47 cents. The plaintiff, at the time of the trial in 1850, was twenty years of age, and the wages for the season of such laborers as he, ranged from 10 to 13 dollars a month.

Nov. Term,
1852.

DALLAS
v.
HOLLINGS-
WORTH.

The main question which this case presents is, whether a suit will lie, under the circumstances, for the value of the plaintiff's labor.

The plaintiff contends that, let the law on the subject as to adults be what it may, he had a right, on account of his infancy, to rescind the contract when he pleased, and sue for the value of his work.

It is a general rule, certainly, that the contracts of an infant are not binding on him. That he is liable on his contract for necessities, is an exception to the rule. Some of his contracts are said to be, by reason of his infancy alone, absolutely void. But the far greater part of an infant's contracts are voidable only, at the election of the infant. The contract before us, which was for work and labor, is of the latter description, and could be avoided at any time by the plaintiff. He has avoided it by leaving the defendant's service and bringing this suit; and we think the suit is sustainable. The case stands, after the avoidance, as if the work had been done at the defendant's request, without any special contract respecting it. This opinion is supported by the decision of the Supreme Court of Massachusetts in *Vent v. Osgood*, 19 Pick. 572. The same doctrine is recognized by the Supreme Court of New York in *Mcdbury v. Watrous*, 7 Hill, 110. There is also a still later decision of the last-named Court, in a case like the present, which sustains our opinion. The Court say, in the case last cited, that the infant plaintiff, in such an action, is entitled, by well settled principles of law, to recover such sum for his services as he would be entitled to if there had been no express contract made. A recovery is allowed upon the assumption that there is no express contract at all. *Whitmarsh et al. v. Hall*, 3 Denio, 375.

We consider, in the case before us, that the plaintiff was entitled to a judgment for the value of his labor, after deducting the small sum paid to him by the defendant; and that, according to the evidence, the defendant cannot complain of the amount of the judgment.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs. Nov. Term,
1852.

J. P. Usher, for the plaintiff.

E. W. McGaughey and *A. L. Rouche*, for the defendant. LIKENS
v.
MILLINER.

LIKENS v. MILLINER.

ERROR to the *Hancock* Circuit Court.

*Wednesday,
December 15.*

PERKINS, J.—*John Milliner* sued *Leonard Likens* before a justice of the peace on the following cause of action:

"*Leonard Likens* to *John Milliner*, Dr. To work and labor from the 12th day of *March*, 1849, to the 7th day of *June*, 1849, three months, at 10 dollars per month, \$30.00."

The cause went by appeal to the Circuit Court. In that Court the cause was tried by a jury upon the general issue, and the plaintiff recovered 27 dollars and 30 cents. A motion for a new trial was overruled.

The plaintiff proved the time he worked for the defendant and the value of his labor. The defendant, to defeat a recovery by the plaintiff, then undertook to prove that the work performed by the plaintiff, *Milliner*, was done under a special contract for one year's service, and that said *Milliner* left his, defendant *Likens's*, employment, without cause, before said year expired. The evidence upon these points was substantially as follows:

Abel Likens, a son of the defendant, testified that the contract between his father and *Milliner* was, that *Milliner* was to work a year at 10 dollars per month, if the two could agree together in two or three weeks' trial.

Leonard E. Likens, another son of defendant, stated that *Milliner* was to work a year, if said *Milliner* and his (witness's) father could agree for one week.

William A. Franklin heard *Likens* tell *Milliner*, after he left, that if he did not come back and work his year out,

Nov. Term,
1852.

LIKENS
v.
MILLINER.

as he had agreed, he would not pay him for what he had done. *Milliner* replied that he would not work for any man that would "jaw him," and that he would sue *Likens* for the time he had worked for him.

Offutt stated that he heard the parties in conversation the *Saturday* before *Milliner* commenced working for *Likens*, when the latter said he wanted a hand to work a year; and the former replied that he would work a year, if they could agree.

Miss *Milton* lived at *Likens's*. *Likens* used frequently to scold and complain of *Milliner* about small matters.

Kauble talked with *Likens* a week after *Milliner* had commenced working for him. *Likens* said *Milliner* was working on trial; was to work a year if they could agree; there was some time fixed, he thinks, for the trial; don't know how long.

On this evidence the Court instructed the jury as follows:

"The sole question for the jury to try is this, viz.: was the plaintiff hired by the defendant for a year, or was the hiring on trial, or by the month as long as the parties could agree?

"If the hiring was by the month for as long as the parties could agree, the plaintiff is entitled to recover for every full month he served. If the hiring was for a year, there is nothing in the evidence to exonerate the plaintiff from a full performance of a year's work, and, consequently, he cannot recover.

"If the work was commenced on trial, the trial completed, and work for a year understood by the parties to be commenced, then it is a case of hiring by the year; but not so if the trial was not completed."

The jury, as we have said, found for the plaintiff, and the Court, hearing the trial, refused to set aside the verdict.

The instructions were certainly as favorable to the defendant below as the law would justify, perhaps more so, though as to this we need express no opinion. The jury, over such instructions, found for the plaintiff, and

the Court who heard the case, and could judge better than we can of the credit to be given to the several witnesses, refused to disturb the verdict.

Nov. Term,
1852.

EVANS
v.
SECRET.

We think this Court would not be justified in pronouncing that refusal erroneous.

Per Curiam.—The judgment is affirmed, with 5 per cent. damages and costs.

T. D. Walpole and *R. L. Walpole*, for the plaintiff.

R. A. Rilev, for the defendant.

EVANS v. SECREST and Another.

A note executed to *Lorena Emerine Evans*, and assigned on the back thereof to the plaintiffs by *George Smith* and *Lorena Emerine Smith*, was filed before a justice of the peace as a cause of action, and a judgment rendered against the maker by default. There was no averment showing that *Lorena Emerine Evans* and *Lorena Emerine Smith* were the same person. On appeal, in the Circuit Court, the defendant moved the Court to dismiss the suit. *Held*, that the motion should have been sustained.

ERROR to the *Putnam* Circuit Court.

Wednesday,
December 15.

PERKINS, J.—Suit before a justice of the peace upon a promissory note and indorsement as follows:

“For value received, I promise to pay unto *Lorena Emerine Evans* the just and full sum of 48 dollars on or before the first day of *January*, 1849, as witness my hand and seal. *Martha Evans* [seal].”

Indorsement on the back thereof—

“We assign the within note to *Secrest* and *Walls*, December 27, 1849. *George Smith*, *Lorena Emerine Smith*.”

Judgment before the justice by default.

Appeal to the Circuit Court. Motion there by the defendant that the suit be dismissed for want of a sufficient cause of action. Motion overruled, and judgment for the plaintiffs for the amount of the note, &c.

We think the motion to dismiss should have been sus-

Nov. Term,
1852.

JOHNSON
v.
BLAKE.

tained. It does not appear, even *prima facie*, by the record that the plaintiffs have an assignment of the note from the payee thereof. It should so appear. There should be an averment showing the identity of *Lorena Emerine Evans* and *Lorena Emerine Smith*. See *Vandagriff v. Tate et ux.*, 4 Blackf. 174.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

J. M. Hanna, for the plaintiff.

J. Cowgill, for the defendants.

JOHNSON v. BLAKE.

The assignee of a note, in order to exercise the diligence in collecting it of the maker which is requisite in collecting a note not payable in bank, need not sue to recover a part of the note which is usurious.

The fact that the assignee knew when he received the assignment that such part was usurious makes no difference.

Friday,
December 24.

APPEAL from the *Marion* Circuit Court.

PERKINS, J.—Bill in chancery by *James Blake* against *Moses Johnson* for the foreclosure of a mortgage. Decree below for the plaintiff.

It appears that *Blake* sold to *Johnson* a parcel of ground in *Indianapolis*, in payment for which the latter assigned to the former the promissory notes of third persons. Accompanying the assignment of the notes *Johnson*, by his agent, *A. Harrison*, executed a mortgage on said parcel of ground conditioned as follows: "That if the said party of the first part, [*Johnson*,] his heirs, executors, or administrators shall pay, or cause to be paid, unto the said party of the second part, [*Blake*,] his heirs, or assigns, the just and full sum of any deficiency that may be found to exist of principal, interest, or costs, in the payment of any of the notes, a list whereof is on the reverse hereof written, and which said notes amounting altogether to 4,998

dollars and 35 cents, as calculated, said *Johnson* has this day caused to be assigned to said *Blake*, and to the collection of which said *Blake* is bound to the legal diligence upon assigned notes *not payable in bank*, then," &c.; "but in case of the non-payment of the deficiency of principal, interest, or costs, upon such diligence as above, when such deficiency is ascertained, then," &c.

Nov. Term,
1852.

JOHNSON
v.
BLAKE.

One of said notes, being for over 400 dollars, was upon *James Rains*, *Andrew Hoover*, and *Charles Garner*. This note was not paid at maturity, and there was a delay of some years before suit was brought upon it. When suit was instituted, the defendants pleaded usury, and established the truth of the plea, whereby the interest on the note was forfeited, under our statute, and the amount which would otherwise have been recovered on the note reduced.

It is the amount of this reduction, with interest and the costs of said suit, that is claimed in the bill before us, and for which a decree was rendered below.

The defense set up is, that such diligence for the collection of the note was not used as is required upon assigned notes not payable in bank.

It is well settled, in regard to such notes, that suit need not be instituted at all upon them by an assignee where he can show they are not collectable from the makers. And in the case before us that part of the note not collected never was collectable. We think the case falls within the settled rule.

It is said *Blake* knew, at the time he took the assignment of the note in question, that it was tainted with usury, and that the motive in requiring him to use diligence was the hope that if said note was speedily urged to payment, the defense of usury might not be set up.

This knowledge could not require him to go beyond his agreement, which was to use the diligence on assigned notes not payable in bank, and his failure to aid in the accomplishment of an illegal purpose would not be a circumstance which a Court should deviate from a straight line to make operate to his disadvantage.

Nov. Term, 1852. <hr/> LITTLE v. WHITE.	<i>Per Curiam.</i> —The decree is affirmed, with 5 <i>per cent.</i> damages and costs. <i>O. H. Smith and S. Yandes, for the appellant.</i> <i>L. Barbour and A. G. Porter, for the appellee.</i>
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LITTLE v. WHITE and Another.

A note was executed in *Ohio* by a citizen of this state payable without any relief whatever from valuation or appraisement laws of *Indiana*. Suit was brought upon the note in this state against the maker, and the Court rendered judgment for the amount thereof, and, also, that the same should be collected without relief from the valuation laws of *Indiana*. *Held*, that the judgment that it should be thus collected, was right.

Friday,
December 24.

APPEAL from the *Shelby* Circuit Court.

Assumpsit upon a promissory note reading as follows:

"\$293.33. *Cincinnati, Ohio, October 17, 1850.* Six months after date the subscriber, of *Shelbyville*, county of *Shelby*, state of *Indiana*, promises to pay to the order of *Peter A. White & Co.*, two hundred and ninety-three dollars and thirty-three cents, value received, without any relief whatever from valuation or appraisement laws of *Indiana*. *William Little.*"

Plea, the general issue. The note, with the admission that it was executed in *Ohio*, was in evidence, and was all the evidence. The Court, to whom the cause was submitted, found for the plaintiffs and rendered judgment for the amount of the note, including interest to the time of the judgment, and that the same be collected without relief from the valuation laws of *Indiana*.

The statute of this state authorizes such a judgment upon such contracts. We think that rendered was right, and it is affirmed with 5 *per cent.* damages and costs.

J. Morrison and S. Major, for the appellant.

W. Henderson and W. A. McKenzie, for the appellees.

EVANS v. SECREST and Another.

Nov. Term,
1852.EVANS
v.
SECREST.

Where a woman, being the payee and holder of a sealed note, marries, the property of the note is in the husband, and he alone, and not the wife, can negotiate and pass it by indorsement.

When the assignment of the note is signed by the husband, the wife's signature to the assignment is mere surplusage.

In a declaration upon a note, the allegation of the non-payment of the note or any part thereof, is a sufficient breach.

ERROR to the *Putnam* Circuit Court.

Friday,
December 24.

BLACKFORD, J.—This was an action of debt brought by *George Secrest* and *Clinton Walls* against *Martha Evans*. The declaration contains two counts.

The first count alleges that, on, &c., at, &c., the defendant, by her sealed note, bound herself to pay to one *Lorena E. Evans*, then sole and unmarried, on, &c., the sum of, &c.; that the payee afterwards married one *George Smith*; that after the note fell due, and after the marriage, and before the payment of any part of the note, the said *Lorena* and her said husband assigned the note to the plaintiffs; of all which the defendant had notice; whereby an action accrued, &c.

The second count is similar to the first, except that it alleges the assignment of the note to have been made by the husband alone.

The declaration concludes as follows: "Yet the said defendant hath not paid the said several sums of money or any part thereof; to plaintiffs' damage of 50 dollars; and hence they sue, &c."

The assignment of the note, as appeared on *oyer*, was signed both by the husband and his wife.

General demurrer to the declaration, and judgment for the plaintiffs.

The property in the note, after the marriage, was in the husband, and he alone, and not his wife, could negotiate and pass it by indorsement. *Macqueen on Husband and Wife*, 20, 51. The wife's signature to the indorsement mentioned in the first count, is mere surplusage.

It is contended that the breach assigned does not show

Nov. Term,
1852.

FIRST
v.
BONEWITZ.

but that the note had been paid to the payee or her husband. We think, however, that the general allegation of the non-payment of the note, or any part thereof, is sufficient.

Per Curiam.—The judgment is affirmed with costs.

J. M. Hanna, for the plaintiff.

J. Cowgill, for the defendants.

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FIRST v. BONEWITZ.

Special count in assumpsit on the following instrument: Received of *J. B.* the sum of 100 dollars paid in land. *Held*, that the receipt did not of itself show a contract implying a consideration. *Held*, also, that it did not of itself show a sufficient consideration for the alleged promise to pay *J. B.* 100 dollars on request. *Held*, also, that the instrument was so ambiguous on its face that no definite meaning could be given to it.

A bad plea is sufficient for a bad count.

Where a plea is a good defense to all the legal causes of action described in the declaration, a demurrer to it should be overruled.

Friday,
December 24.

ERROR to the *Huntington* Circuit Court.

BLACKFORD, J.—*Bonewitz* sued *First* in assumpsit. The declaration contains four counts.

The first count is to the following effect: For that the defendant, on, &c., executed to the plaintiff a receipt as follows: "May 8, 1837. Received of *Joseph Bonewitz* the sum of 100 dollars paid in land." Meaning that said sum of 100 dollars was paid by the plaintiff for said defendant. (Signed,) "*Israel First*." By which receipt the defendant acknowledged to have received from the plaintiff said 100 dollars; and in consideration thereof, afterwards agreed to pay said sum to the plaintiff when he should be thereunto requested. The plaintiff afterwards demanded payment of said sum, which the defendant refused to pay.

The other counts are the common ones for money lent, money paid, and for money had and received.

The defendant pleaded to the whole declaration, non assumpsit and the statute of limitations.

General demurrer to the special plea, and the demurrer sustained.

Nov. Term,
1852.

The cause was tried on the general issue, and a verdict and judgment rendered for the plaintiff.

FIRST
V.
BONEWITZ.

The special plea being demurred to, we must examine the declaration; and we think the first count is insufficient. The defendant's receipt there mentioned is, as we understand it, as follows: "*May 8, 1837. Received of Joseph Bonewitz the sum of 100 dollars paid in land.*" That receipt, of itself, shows no contract implying a consideration; nor does it, of itself, show a sufficient consideration for the alleged promise, that is, a benefit to the defendant or a detriment to the plaintiff. The count we are considering says, by way of *innuendo*, that the instrument means that the sum of 100 dollars was paid by the plaintiff on land for the defendant. We are not able, however, from the terms of the instrument, to give it that meaning. Indeed, the instrument is so ambiguous on its face, that we cannot assign to it any definite meaning whatever. The first count, therefore, contains no cause of action.

There is no objection to the other counts; and to those counts the special plea is a good bar. It is of no consequence whether that plea is valid or not in regard to the first count, for a bad plea is sufficient for a bad count.

The special plea being a good defense to all the legal causes of action described in the declaration, the demurrer to it should have been overruled.

The judgment for the plaintiff is consequently erroneous, and must be reversed.

Per Curiam.—The judgment is reversed, and the verdict set aside with costs. Cause remanded, with leave to the plaintiff to amend the first count.

R. Brackenridge, Jr., for the plaintiff.

J. R. Slack, for the defendant.

Nov. Term,
1852.

MARKIN
v.
JORNIGAN.

MARKIN v. JORNIGAN.

In replevin, in a justice's Court, the value of the property as specified in the declaration, and not in the affidavit, governs as to the jurisdiction of the Court.

Each count in a declaration is considered as containing a distinct cause of action.

The declaration in replevin before a justice of the peace contained two counts, and the property specified in each count was alleged to be of the value of 40 dollars. *Held*, that the justice had no jurisdiction of the case.

Friday,
December 24.

ERROR to the *Blackford* Circuit Court.

BLACKFORD, J.—This was an action of replevin brought by *Jornigan* against *Markin* in a justice's Court. Judgment by the justice for the plaintiff. The defendant appealed to the Circuit Court, and the plaintiff obtained there a verdict and judgment.

The defendant contends that the justice had no jurisdiction; the causes of action being for too large an amount.

The justice had no jurisdiction, if the value of the property claimed exceeded 50 dollars. R. S. 862, s. 2. *Middleton v. Harris*, 6 Blackf. 397.

The plaintiff's affidavit filed before the justice, states the value of the property claimed to be 40 dollars.

The declaration, which was filed before the justice, is substantially as follows: For that the defendant, on, &c., at, &c., wrongfully took, and still wrongfully detains, from the plaintiff a certain young mare of the value of 40 dollars, the property of the plaintiff; to the plaintiff's damage 20 dollars; hence he sues. And for that, on, &c., at, &c., one filly of the value of 40 dollars, the plaintiff's property, came into the defendant's possession, and has been since, and still is, unlawfully detained by him, to the plaintiff's damage 20 dollars; hence he sues.

This declaration contains two counts. The young mare mentioned in the first count, and the filly mentioned in the second count, are alleged to be each of the value of 40 dollars. If, therefore, we consider the counts as containing separate causes of action, as we must do, the va-

lue of the property claimed by the declaration is 80 dollars; and it is the declaration, not the affidavit, that shows the value of the property sued for. That on this question of jurisdiction, each count must be considered as containing a distinct cause of action, has been frequently decided by this Court. *Swift v. Woods*, 5 Blackf. 97.—*Wetherill et al. v. The Inhabitants, &c.*, id. 357.

The plaintiff, therefore, shows that the value of the property, on account of which he sues, exceeds the jurisdiction of the justice. The consequence is, that the judgment cannot be sustained.

Per Curiam.—The judgment is reversed with costs. Cause remanded with instructions to the Circuit Court to dismiss the suit for want of jurisdiction.

J. S. Buckles and J. Brownlee, for the plaintiff.

J. Smith, for the defendant.

Nov. Term,
1852.

SLOAN
v.
KINGORE.

SLOAN v. KINGORE and Another.

A. sold to B. nine cribs of corn, at 20 cents a bushel, with a warranty that they contained 2,500 bushels, and an agreement that, if they did not, A. would supply the deficiency. The sum to be paid for the 2,500 bushels was agreed on, and time given for the payment; and the cribs of corn were left with A., as B.'s agent, to be taken care of for B. Held, that, as between A. and B., the sale was complete. Held, also, that B. had no lien on the corn. Held, also, that, supposing there was not such a change of possession as is contemplated by s. 8, c. 33, R. S. 1843, yet even as between B. and a subsequent *bona fide* purchaser from A., the sale to B. was valid.

ERROR to the *Fountain* Circuit Court.

BLACKFORD, J.—On the 10th of March, 1850, *Joseph L. Sloan* brought an action of replevin, in the *Fountain* Circuit Court, against *John Kingore* and *Chauncey Scott*. *Kingore* made default. *Scott* pleaded property in himself. The plaintiff replied that the property was his. Verdict and judgment for the defendants.

Friday,
December 24.

Nov. Term,
1852.

SLOAN
v.
KINGORE.

The facts are as follows: On the 29th of *December*, 1849, *Kingore*, at a certain farm in said county on which he resided, proposed to sell to one *Glover* 2,500 bushels of corn, and showed him nine cribs of corn there situate. *Kingore* said that the cribs had been measured, and that they contained 2,500 bushels. *Glover* said he did not believe the cribs contained that quantity. *Kingore* said that if on measurement the cribs failed to measure 2,500 bushels, he would make up the deficiency out of his barn. *Glover* was the agent of *Sloan*, the now plaintiff, and told *Kingore*, that he was buying the corn for *Sloan*. *Glover* then bought for *Sloan*, from *Kingore*, 2,500 bushels of corn at (as the witness said) 21 cents a bushel; *Kingore* agreeing that if said cribs, on being measured, did not contain 2,500 bushels of corn, he would make up the deficiency out of his barn. *Kingore* and *Glover* then went to the cribs, and after they had examined them, *Kingore* said to *Glover*, as agent of *Sloan*, that from that time forward the corn in those nine cribs was the property of and at the risk of *Sloan*, and that in case of loss or damage by storms, thieves, or otherwise, the loss was to be *Sloan's*, and not his, (*Kingore's*). *Glover* then took possession of the cribs of corn as the property of *Sloan* and as his agent, and in pursuance of said purchase, with the understanding with *Kingore* that any deficiency was to be made up out of *Kingore's* barn. *Glover*, as said agent, then employed *Kingore* to take care of the corn, and, if any boards blew off of the cribs, *Kingore* was to put them on and secure the corn from the weather, and be paid for his trouble. At the time of this contract, *Kingore* was indebted to *Sloan* for money secured by some promissory notes given by *Kingore* and assigned to *Sloan*, one of which was for 13 dollars and some cents; which notes formed a part payment on the contract, and were, in pursuance thereof, delivered up to *Kingore* on the 5th of *June*, 1850. The corn so sold by *Kingore* to *Sloan*, is the same corn in controversy in the present suit. *Glover* made a memorandum of the contract at the time, which, as he swears, contains substantially the contract between *Kin-*

gore and Sloan. That memorandum states that, on the 29th of *December*, 1849, said *Sloan* bought of *Kingore* 2,500 bushels of corn, then delivered to *Sloan* in the pens on the farm occupied by *Kingore*, at the rate of 20 cents a bushel, of which sum 25 dollars were to be paid on the 15th of *February*, 1850, and the residue, 425 dollars, on the 1st of *August*, 1850.

Nov. Term,
1852.

SLOAN
v.
KINGORE.

The defendant, *Scott*, on the 20th of *February*, 1850, bought of *Kingore* six cribs of corn, agreeing to take them at 1,600 bushels, at 25 cents a bushel.

We are of opinion that these facts sustain the suit. *Scott* contends that the sale to the plaintiff could not be complete until the corn in the cribs was measured. The law on the subject is, that if any material act should remain to be done on the part of the seller, *previously to the delivery of the goods*, the property will not pass to the vendee until such act shall have been done. Williams on Personal Property, 36. But that rule does not apply to this case. Here the nine cribs of corn were sold and actually delivered by *Kingore* to *Sloan* at so much a bushel, with a warranty that they contained 2,500 bushels, and an agreement that, if they did not, the seller would supply the deficiency. The sum to be paid for the 2,500 bushels, namely, 450 dollars, was agreed on, and time given for the payment. The cribs of corn were left with *Kingore*, merely as *Sloan's* agent, to be taken care of for his principal. These acts rendered the sale of the nine cribs of corn complete, as between *Kingore* and *Sloan*, and take the case out of the above-mentioned rule. The corn, it is true, was to be subsequently measured, but that was only to ascertain whether the seller's warranty was complied with. The same acts also deprived the seller of any lien, which he might otherwise have had, for the unpaid price of the corn.

But as *Scott* may be a *bona fide* purchaser for value, we must examine whether his purchase can derive any aid from the circumstance that the corn was left by *Sloan* in *Kingore's* possession. We have a statute on the subject, which must determine this point. The statute pro-

Nov. Term,
1852.

HAMILTON
v.
THE STATE.

vides that a sale of goods, if not followed by an actual change of possession, will be presumed fraudulent as to subsequent purchasers in good faith, and be conclusive evidence of fraud, unless it appear that the sale was made in good faith, and without intent to defraud such purchasers. R. S. p. 590. Now, supposing that there was not, in the first sale, such a change of possession as the statute contemplates, that circumstance will not affect this case. The reason is, that the evidence sufficiently shows that the first sale was made in good faith and without any fraudulent intention.

Per Curiam.—The judgment is reversed, and the verdict set aside with costs. Cause remanded, &c.

R. A. Chandler, for the plaintiff.

H. S. Lane and *S. C. Willson*, for the defendants.

HAMILTON v. THE STATE.

A prisoner indicted for a crime requested a continuance on account of the judge having been employed by him as counsel before his election to the bench; but the state waived any objection to the judge on that account. *Held*, that the continuance was properly refused.

The prisoner then moved for a continuance in order to procure the testimony of an absent witness; but the state admitted that the witness would swear to the facts alleged in the prisoner's affidavit, but reserved the right to impeach her credibility. *Held*, that the motion was correctly overruled.

The prisoner then moved for a continuance upon an affidavit stating that he was informed that morning only that one *H.* was to be introduced as a witness against him, and that he had, until then, believed that said *H.* was confined in jail in *Marion* county, and, therefore, did not deem it necessary to subpoena witnesses to impeach his testimony, and that if the cause should be continued he could procure the attendance of witnesses whose names he could not then state, by whom he could prove that said *H.* was a man of bad general character and unworthy of belief, &c. *Held*, that the motion was rightly overruled.

Confessions made by a prisoner, after he has been professionally advised of their effect, are admissible in evidence against him.

It is not the duty of the Court to give irrelevant instructions to the jury.

ERROR to the *Wayne* Circuit Court.

SMITH, J.—This was an indictment for arson. The defendant was found guilty and sentenced accordingly. Motions for a new trial and to arrest the judgment were overruled.

Nov. Term,
1852.

HAMILTON
v.
THE STATE.

Friday,
December 24.

Upon the cause being called the defendant requested a continuance on the ground that the judge of the Court had been employed by him as counsel, before his election to the bench, and the counsel for the state thereupon waived any objection to the judge and a continuance was refused.

The defendant then moved for a continuance upon an affidavit stating that he could not safely go to trial, in consequence of the absence of a witness who would testify that on the night the arson was alleged to have been committed, the defendant was at the house of the witness from dusk until he went to bed, and was there early in the morning, and that he was not out of the house that night; whereupon the counsel for the state admitted that the witness named would testify to these facts, but reserved the right to impeach her credibility. The defendant insisted that the case should be continued unless the counsel for the state would admit the truth of the facts the evidence would conduce to prove, which he refused to do.

The defendant then moved again for a continuance upon an affidavit stating that he was informed that morning only, that one *Harkrider* was to be introduced as a witness against him, and that he had, until then, believed said *Harkrider* was confined in jail in *Marion* county, and, therefore, did not deem it necessary to subpoena witnesses to impeach his testimony; and that if the cause was continued he could procure the attendance of witnesses, whose names he could not then state, by whom he could prove that said *Harkrider* is a man of bad general character and unworthy of belief in a Court of justice.

The defendant has no reason to complain of the decisions of the Court overruling these several motions for a continuance. He had all the advantage he could have

Nov. Term,
1852.

HAMILTON
v.
THE STATE.

derived from the testimony of the witness named in his first affidavit if she had been personally present, and the other reasons offered for a continuance are manifestly insufficient.

On the trial, the prosecuting attorney offered to prove by certain admissions of the defendant that he had committed the offense charged against him, whereupon some testimony was elicited relative to the circumstances under which the admissions were made, with the view of showing that they had been extorted by improper influences. It appeared that the defendant had been arrested on a charge of larceny, and, being taken into a room, inquiries were made of him relative to the arson which had been committed, in the presence of one *Crawford*, the proprietor of the building which had been burned, *Jonathan Newman*, and some other persons. A conversation then took place as to whether the defendant would be benefited by making a confession. Some of the persons present said they thought he would, and that if he became state's evidence it would be easier for him, or that it was customary under such circumstances for a *nolle prosequi* to be entered. Others of the persons present told him that his admissions would not benefit him, and he was unwilling to make any admissions without the advice of a lawyer. An attorney at law was then sent for, who told the defendant that his confessions would be of no advantage to him, further than they might recommend him to the clemency of the Court, and that if he did make confessions he must do so in full view of all the circumstances, and they might or might not operate in his favor.

After hearing this evidence the Court permitted the said *Crawford* and *Newman* to testify that, immediately after the conversation above stated, the defendant confessed to them that he had committed the offense charged in the indictment.

Afterward the defendant requested the Court to instruct the jury, that if they believed the confessions made in the presence of *Crawford* and *Newman* were made under the influence of expectations of favor held out to the

defendant, those confessions should be disregarded; which instruction the Court refused to give.

We think it sufficiently appears that the admissions objected to were not made under the influence of expectations of favor improperly held out to the defendant. It is shown that he did not depend upon the representations made by some of the persons present that he would be thereby benefited, but made the confessions after being warned by a lawyer sent for at his request, that such representations were erroneous. The admissions were, therefore, properly admitted in evidence, and the instruction asked for might have been correctly refused on the ground that it was irrelevant.

Per Curiam.—The judgment is affirmed with costs.

J. S. Newman, J. P. Siddall, and N. H. Johnson, for the plaintiff.

D. S. Gooding, for the state.

Nov. Term,
1852.

McCoy
v.
McCoy.

McCoy v. McCoy.

Bill by husband against wife for a divorce, on the ground of abandonment by the wife. It was proved, at the hearing, that a separation had taken place, and the wife had afterwards said she did not intend to live again with the husband; but it did not appear which party had abandoned the other. *Held*, that the bill was properly dismissed.

ERROR to the *Putnam* Circuit Court.

SMITH, J.—This was a bill filed by *James H. McCoy* against his wife to obtain a divorce on the alleged ground of abandonment. The Circuit Court heard the proof and dismissed the bill.

Three witnesses were examined on the part of the complainant, the defendant having made default. These witnesses stated that the parties were married in *December*, 1846, and lived together nearly two years, having one child during the marriage. That in *October*, 1848, the

Friday,
December 24.

Nov. Term,
1852.

McCor
v.
McCor.

complainant brought the child to his father's house and the parties did not live together afterward. That the defendant had been to see the child but twice since the separation. That while living together the complainant treated the defendant kindly, and provided for her as well as his circumstances enabled him, and about as well as persons in his condition in the neighborhood provided for their families; and that since the separation the defendant had been supporting herself by working from house to house in the neighborhood. Two of the witnesses stated that they had heard the defendant say, at different times, that she did not intend to live with the complainant again, but made no complaint of his conduct, except that at one time, when she was sick, she thought he had neglected her.

We think this evidence was not sufficient to authorize a decree for the complainant. It does not appear which party abandoned the other. It is, perhaps, sufficiently proved that there was a separation, and that the wife had afterward said that she did not intend to live again with her husband, but it may have been the case that he had abandoned her. None of the witnesses say anything about the facts which occurred at the time of the separation. One of them, a brother of the complainant, said he did not know of the separation of the parties until four or five days after it had occurred, when the complainant came with his child to the house of his father, where the child had remained ever since. This does not show which of the parties was in fault, and it is the only evidence from which the cause of the separation can be inferred.

Per Curiam.—The decree is affirmed with costs.

J. Cowgill, for the plaintiff.

D. S. Gooding, for the defendant.

WILSON v. THE ÆTNA INSURANCE COMPANY.

Nov. Term,
1852.WILSON
v.
ÆTNA INSU-
RANCE COMP'Y.

A plaintiff who has suffered a voluntary non-suit cannot afterward prosecute a writ of error for a refusal of the Court, upon his motion, to re-instate the cause.

ERROR to the *Jefferson* Circuit Court.

Friday,
December 24.

SMITH, J.—The plaintiff in error brought an action of covenant against the defendant, for losses incurred by fire. By a bill of exceptions it appears that, the cause being at issue, and the plaintiff being about to offer his evidence, the first thing necessary to be proved was the loss of the policy of insurance, in order that he might be authorized to prove its contents by secondary evidence. For this purpose the plaintiff offered certain affidavits, and also some parol testimony, which were rejected as inadmissible, or as insufficient, by the Court.

The plaintiff's counsel then informed the Court that he must suffer a non-suit, with a motion to set aside the non-suit and re-instate the case on the docket again. The Court informed him that both motions could not be made at once, but that after the non-suit the other motion could be heard. The plaintiff then suffered a voluntary non-suit, and immediately afterward made a motion to have the non-suit set aside and the cause re-instated.

The motion to re-instate was founded on an affidavit stating the facts as to the refusal of the Court to admit secondary evidence of the contents of the policy, and that the counsel for the plaintiff were taken by surprise in all the decisions made by the Court, and also by the statement of a witness relative to his having sent away an affidavit, which they had given him notice to produce. This motion was overruled.

We have not thought it necessary to examine whether the points raised in the Court below were decided correctly or not, as we are of opinion that a writ of error will not lie in such a case as the present. It has been heretofore decided by this Court, that if the plaintiff suffer a voluntary non-suit in consequence of the erroneous ex-

Nov. Term,
1852.

BAKER
v.
LEATHERS.

clusion of his evidence, he cannot bring a writ of error, and we do not think the overruling a motion to re-instate the cause after the non-suit had been suffered, places this case on any stronger ground than that of *Vestal v. Burditt*, 6 Blackf. 555.

Per Curiam.—The writ of error is dismissed with costs. *S. C. Stevens*, for the plaintiff.

3	558
128	356
3	558
148	356
150	301

BAKER v. LEATHERS and Others.

Where the material facts alleged in a bill are admitted by the answer, but distinct facts are set up in avoidance, the burthen of proof is upon the defendant.

If a father purchases land with his own money, and by way of advancement to his daughter takes the deed in her husband's name, no resulting trust arises in favor of the father.

If the father afterward purchases the land of the son-in-law, the advancement to the daughter cannot be deducted from the purchase-money.

A resulting trust may be established by the parol declarations of the person to whom the conveyance is made.

Such evidence is, however, most unsatisfactory, on account of the facility with which it may be fabricated, the impossibility of contradiction, and the consequences which the slightest mistake or failure of memory may produce; yet if it is plain, consistent, and, especially, if corroborated by circumstances, it is competent ground for a decree.

The Supreme Court will weigh the evidence in a suit in chancery where it is conflicting.

Tuesday,
February 1,
1853.

APPEAL from the *Kosciusko* Circuit Court.

STUART, J.—This was a bill in chancery by *Jacob S. Baker* against the heirs of *Jacob Leathers*, deceased.

The bill and the several amendments state that *Baker* owned a tract of land in *Kosciusko* county, part of which he sold to *Jacob Leathers*, deceased, for 1,130 dollars, to be paid in cash, or secured by the promissory notes of *Leathers* so soon as the latter returned to his home in *Ohio*. At the time of the sale, *Leathers* was on a visit to the complainant, who was his son-in-law. After the return

of *Jacob Leathers* to *Ohio*, his son, *Silas Leathers*, one of the defendants, visited *Baker*, and, on the eve of his return, *Baker* and wife executed a deed to *Jacob Leathers* for the land so sold, being the same land particularly described in the bill. The bill alleges that the utmost confidence and good understanding subsisted between *Baker* and his said brother-in-law, *Silas Leathers*. He accordingly placed the deed in the hands of *Silas*, to be delivered to said *Jacob Leathers*, the father, when the latter should have executed his notes to *Baker* for the purchase-money; expressly charging in the bill that the deed was delivered as an *escrow*. The bill avers that *Jacob Leathers* never returned to *Indiana*; never gave his notes; never paid the purchase-money; that he died shortly after, leaving the defendants his heirs at law, and said *Silas* his executor; and that they have failed and refused to pay the purchase-money. It is further charged that, shortly after the delivery of the deed to *Silas*, instead of taking it to *Ohio* as directed, he secretly had it recorded, contrary to the said instructions, and without the knowledge of the complainant. In one of the several amendments to the bill *Baker* admits the receipt of 500 dollars of the purchase-money. The bill makes the heirs of *Jacob Leathers*, deceased, defendants, requires them to answer under oath, and prays for special and general relief.

Silas Leathers answers, substantially admitting the purchase, but alleging payment of the purchase-money before the execution of the deed. He denies that the deed was delivered as an *escrow*, but, on the contrary, insists that it was delivered to him for his father. He also denies that the deed was recorded contrary to the instructions or wishes of *Baker*.

Several of the other defendants file answers; but they put the defense on entirely different ground from that taken by *Silas*. The answer of *John Leathers* is to this effect. He assumes that in the original purchase of the land by complainant from *Scoles*, *Baker* was the mere agent of *Jacob Leathers*, senior; that *Baker* had fraudulently taken the deed in his own name; thus holding it in

Nov. Term,
1852.

BAKER
v.
LEATHERS.

Nov. Term,
1852.

BAKER
v.
LEATHERS.

trust for said *Leathers*, senior. He further alleges that the price was 1,000 dollars; that the money was paid by his father in *May*. 1840; and that the deed of *Baker* to *Leathers*, senior, was not delivered as an *escrow*. Yet, in a subsequent part of his answer, he avers that he himself paid *Baker*, for his father, on account of the purchase of the land, the sum of 880 dollars.

The answers of *Mary Ann*, *Jacob*, and *William Leathers* take the same position as that assumed in *John's* answer, and very nearly in the same words. Even *Silas* files a second answer, in which he follows *John* with remarkable precision. The circumstance, that all the answers are virtually copies of *John's* answers, that there is not merely a general resemblance, but a sameness even to the very paragraphs and phraseology, is a singular one. It is seldom that different persons think the same thoughts, in the same order, and clothe them in the same language.

It is admitted by all the answers that *Silas* never delivered the deed to his father; though over two years intervened between the recording of the deed and his father's death.

There was no demurrer to the bill or amendments; no exceptions to the answers; and in this Court no authorities have been cited by either party. On final hearing the Court dismissed the bill at complainant's costs. *Baker* appeals.

The depositions are very voluminous. An abstract of them, brief and unsatisfactory as it must be, would answer no good purpose, and would swell the opinion far beyond the relative importance of the questions involved.

Had the test of demurrers and exceptions been applied to the pleadings in the Court below, it would have narrowed and pointed the issues, and greatly facilitated the labors of this Court. Without such tests, it is no easy matter to deduce from the bill, amendments, and answers the precise state of facts assumed and relied upon by the respective parties.

From these pleadings the only issue to be gleaned, which is material, is this: Did *Leathers*, senior, pay or advance any money, and if so, for what purpose?

The purchase of the land by *Baker* from *Scoles*, and the deed for a part of this land by *Baker* to *Leathers*, senior, are not disputed. *Baker* alleges that the consideration of that deed was 1,130 dollars, and that *Leathers* has never paid it. The heirs answer he did pay it in this way—he advanced to *Baker*, as his (*Leathers's*) agent, the money to buy the land from *Scoles*—*Baker* fraudulently took the deed in his own name; and his deed of *November 16, 1840*, to *Leathers*, senior, was made in consideration of the previous payment and to purge the previous fraud.

By the issue thus tendered the burden of proof devolved on the defendants. 6 Blackf. 542.—7 Blackf. 162. If the depositions on the part of the defense sustain that issue, the Court below was correct in dismissing the bill.

As has been observed, the evidence on both sides takes a very wide range. We have examined and weighed it with great care. It is clearly proved that *Leathers*, senior, advanced money to *Baker*, but not for the purpose alleged in the answers. The evidence is, that in the year 1839, *Baker* bought a tract of land from *Scoles* for 1,400 dollars, paid 10 dollars, and entered into a sealed agreement specifying the terms of purchase; that, at the time, in the presence of *Silas*, one of the defendants, *Baker*, on inquiry made, told how he expected to pay for it, viz., by the proceeds of lands he had lately sold, and if he needed more he expected to get it from *Leathers*, senior, his father-in-law, as an advancement to his wife. *Silas Leathers* replied, his "father had promised to do so." In *May, 1840*, *Baker* paid part of the money, gave his note for part, and *Leathers*, senior, paid the balance, distinctly putting it upon the ground of an advancement to *Margaret Baker*, wife of the complainant.

It will not be contended that money thus advanced, supported by the consideration of natural love and affection, can be resumed at pleasure, or recovered by the donor or his heirs either at law or in equity. Yet that is the claim

Nov. Term,
1852.

BAKER
v.
LEATHERS.

Nov. Term,
1852.

BAKER
v.
LEATHERS.

set up in this defense. The father advances his daughter by paying for land, and takes the deed, if you please, in the name of her husband. He subsequently purchases part of the land from his son-in-law, and, after his death, his heirs seek to make the prior advancement meet the consideration expressed in the deed. In other words, they wish to resume the donation, to recover back the advancement. The deed from *Scoles* to *Baker* for the entire tract of land was executed and delivered to him in the presence of *Leathers*, senior, and of *John Leathers*, one of the defendants. In the language of the witnesses, there was no intimation from any quarter, that the land belonged to any other person than *Jacob S. Baker*. *Leathers*, senior, spoke of the part he paid as a "legacy or gift" to his daughter. These facts repel the allegation in the several answers, that *Baker* fraudulently took the deed in his own name. Under such circumstances there could be no resulting trust to *Leathers*, senior. 6 Blackf. 193.—10 Paige, 618.—9 Dana, 84.

This view of the case is abundantly sustained by the depositions of *Baker*, senior, of *George Scoles*, and above all, of *John Scoles*, who sold the land to *Baker*. They were all present at the making of the contract between *Scoles* and *Baker* in 1839; and again at its consummation in May, 1840, when the money was paid and the deed delivered. They speak of the transaction as a whole. They speak of *Baker's* expectation of aid from his father-in-law, openly expressed at the time of the purchase in 1839. On that occasion *Silas*, one of the defendants, at another time *John*, also a defendant, announced that their father intended to furnish such aid. The father himself frequently expressed his intention of doing something for *Baker*, making a "gift or legacy" to his daughter, Mrs. *Baker*, &c. He made that "gift" by paying part on *Baker's* land, so designating the payment at the time, and accordingly by his acts directing the deed to be made to *Baker*. If he afterwards bought land from *Baker*, what reason is there why he or his heirs should not pay like any other purchaser? This view of the case is entirely

consistent with the allegations of the bill, and utterly inconsistent with the matter in avoidance set up in the answers.

Nov. Term,
1852.

BAKER
v.
LEATHERS.

It is readily admitted that a resulting trust may be established upon the parol declarations of the person in whose name the conveyance is taken; but "such evidence is most unsatisfactory, on account of the facility with which it may be fabricated, the impossibility of contradiction, and the consequences which the slightest mistake or failure of memory may produce. Yet if plain, consistent, and, especially, if corroborated by circumstances, it is competent ground for a decree." 2 J. C. R. 405.—1 Wendell, 626. The evidence for the defendants does not bring them within this rule. It is not to be denied, however, that the testimony deduced from the two sets of depositions cannot be reconciled. In such cases it is our duty to weigh the evidence. We have done so. The result is that the preponderance is strongly in favor of the complainant. Against the array of facts disclosed in the depositions of *Baker* and *G.* and *J. Scoles*, fortified as they are by the depositions of other witnesses—facts, too, which explain in natural and clear connection the whole history of the transaction in entire accordance with the face of the title papers—against such evidence the "impressions" and "understandings" of witnesses from loose conversations imperfectly understood as such things must be, and contradicting the face of contemporaneous title papers as these do, are not entitled to much weight. Indeed, we have not attached much importance to the numerous conversations, several years old, collected against each other by the respective parties. There is a clear, unvarying language in the facts which careless admissions conveyed to us through the dull ear and imperfect memory of witnesses cannot be permitted to control.

From a careful review of the whole case we think the Court erred in dismissing the bill. The decree should have been for the purchase-money with interest. The evidence shows that the price agreed upon was 1,000 dol-

Nov. Term,
1852.

NEFF
v.
THE STATE.

lars, and the assumption by *Leathers*, senior, of the payment of *Baker's* note to *Scoles* of 120 dollars, which it is proved *Baker* himself afterwards paid, making the whole consideration 1,120 dollars, with interest, from *November 16, 1840*, deducting the 500 dollars admitted by *Baker* to have been paid. As there is nothing in the evidence to show that *Leathers* had ever paid any money on the purchase from *Baker*, but only that he had advanced money to his daughter, *Mrs. Baker*, long prior to that purchase, it would seem that *Baker's* admission of 500 dollars relates to that advancement. But as he has admitted the payment, without explanation, he is bound by it; and as there is no date specified, and no evidence of such payment after *November 16, 1840*, we must presume that it was paid on or before that day. So that the decree will be for the residue, namely, 620 dollars, with interest from *November 16, 1840*, the date of the deed.

Per Curiam.—The decree is reversed. Cause remanded, with instructions to the Circuit Court to enter a decree for the complainant as above indicated, declaring it a lien on the land described in the bill, giving the defendants thirty days to pay the amount of the decree, with costs, and in default thereof that execution issue to sell the land, &c.

T. G. Harris, for the appellant.

J. B. Niles, A. L. Osborn, and D. D. Pratt, for the appellees.

NEFF v. THE STATE on the Relation of ANNA PATTERSON.

A complaint for bastardy is not bad for omitting to allege that the complainant is a resident of the county where the suit was commenced. Where the state appeals from the judgment of the justice in a case of bastardy, no appeal-bond is necessary. If the defendant appears upon the appeal, and submits to a trial by jury, he cannot afterward object that the appeal was improperly taken.

The judgment for the complainant in a case of bastardy, was in this form: It is considered, &c., that for the maintenance of the said bastard child, the said plaintiff recover against the defendant to and for the use prescribed by law, &c. *Held*, that the judgment was substantially good. The judgment in a case of bastardy ordered the first instalment thereof to be paid at a future day, and in a subsequent clause execution was awarded "forthwith" to collect said instalment. The Supreme Court *held* that this last clause did not affect the rest of the judgment; but they reversed the judgment in that particular without costs.

Nov. Term,
1852.

Neff
v.
THE STATE.

ERROR to the *Hendricks* Circuit Court.

STUART, J.—The complainant filed before a justice of the peace her affidavit, alleging that she was pregnant, &c., and that *Neff* was the father of the child. *Neff* was brought up on a warrant; and the justice, after hearing the evidence of *Anna*, which is all set out in the record, found *Neff* not guilty, and discharged him.

Tuesday,
February 1,
1853.

From this decision the state appealed to the Circuit Court. Motions to dismiss for want of a sufficient affidavit, and for want of an appeal-bond, were severally overruled; trial by jury on the general issue; verdict of guilty and judgment for the state for the use, &c.

Neff prosecutes his writ of error. He insists that because the affidavit does not show that the complaining witness was a resident of *Hendricks* county, his motion to dismiss should have been sustained. The authorities are against him. There are several decisions of this Court in point. 4 Blackf. 269.—5 id. 165. Besides, in the absence of any authority, as the affidavit is not made part of the record, we must presume that the ruling of the Court below was correct.

The second objection, namely, the want of an appeal-bond, is equally untenable. When the state appeals, in cases of this kind, no appeal-bond is necessary. The statute of 1843, in relation to appeals, does not materially differ from that of 1838. In the case of *Walker v. The State*, 6 Blackf. 1, the latter statute came under review in this Court. It was decided that the state could appeal. But the Court placed the decision as to an appeal-bond on the ground that neither the state nor the complainant would be liable for costs if the suit failed,

Nov. Term,
1852.

NEFF
v.
THE STATE.

and hence that a bond was useless. It is urged that there was really no appeal properly taken in this case. The Court below and the defendant himself treated it as an appeal; and we must take him at his word. After the defendant has appeared and reaped the benefit of a jury trial, it is too late to inquire by what avenue the case came to the Circuit Court.

The third objection is to the form of the judgment. It runs thus: "It is considered and adjudged and ordered that for the maintenance of the said bastard child the said plaintiff do recover against the defendant to and for the uses prescribed by law," &c. It would have been better had the form indicated in 2 Blackf. 230, been observed. And yet it might seem like descending to the small things of the law, to weigh the force of the expressions used in the one case and in the other. The judgment of the Court below, in this respect, is substantially good. It is equivalent to ordering the money to be paid to the party who "shall maintain the child or become entitled to the same by law."

There is, however, an inconsistency in the judgment. The first instalment of 83 dollars and 33 cents is ordered to be paid on the first of *May*, 1853. In a subsequent clause execution is awarded on this instalment "forthwith." This may be a clerical error, and intended to read "forthwith after said first instalment falls due." As it is, it cannot be sustained. But the reversal of this incongruous clause will not affect the judgment.

Per Curiam.—That part of the judgment awarding execution on the first instalment *instantly* is reversed, without costs. The residue is affirmed.

C. C. Nave, for the plaintiff.

J. S. Harvey and *J. M. Gregg*, for the state.

McALPIN v. THE STATE.

Nov. Term,
1852.McALPIN
v.
THE STATE.

An indictment, under the R. S. 1843, was as follows: The grand-jurors impaneled, &c., upon their oath, present that *A. B.*, on, &c., at the county, &c., aforesaid, and continuously from that day until the day of the finding of this bill of indictment, had and possessed a house, a room, a shed, and a tenement, situate in said county, and that said *B.* there, during all the time aforesaid, did keep and suffer his said house, room, shed, and tenement, to be used and occupied for gaming, contrary, &c. Held, that the indictment was good. Held, also, that to sustain the indictment, it was sufficient to prove that the defendant kept either of the places specified, for any length of time, to be used, &c., for gaming.

To sustain the indictment, it is not essential to prove that the gaming actually took place at the house, but the commission of the offense may be inferred from circumstances.

ERROR to the *Jefferson* Circuit Court.

Tuesday,
February 1,
1853.

PERKINS, J.—The grand jury of *Jefferson* county returned into the *Jefferson* Circuit Court a bill of indictment against *John McAlpin*, reading as follows:

"The grand-jurors, impaneled, &c., upon their oath, present that *John McAlpin*, on, &c., at the county of *Jefferson* aforesaid, and continuously from that day until the day of the finding of this bill of indictment, had and possessed a house, a room, a shed, and a tenement, situate in said county; and that the said *McAlpin* there, during all the time aforesaid, did keep and suffer his said house, room, shed, and tenement, to be used and occupied for gaming, contrary," &c.

This indictment the defendant moved to quash for defects appearing, as he alleged, on its face; but the Court overruled the motion, and rightly. The indictment charges the offense in the language of the statute, and such an indictment, in a case like the present, was held sufficient in *The State v. Miller*, 5 Blackf. 502.

The cause was then tried by jury upon the plea of not guilty, and the defendant was convicted.

Upon the trial, and at the proper time, a bill of exceptions states, the defendant prayed the Court to instruct the jury: "That the charge as laid in the indictment,

Nov. Term,
1852.

McALPIN
v.

THE STATE.

viz., that the defendant did keep and suffer his said house, room, shed, and tenement, to be used and occupied for gaming, must be proved as laid, and proof of gaming in only one of those places laid in the indictment, will not warrant a conviction;" and further, "that said offense charged in said indictment is a continuous act, and must be proved," &c.; which instructions the Court refused to give.

In this the Court committed no error.

Russell, in his work on Crimes, vol. 2, p. 708, says:

"Although it be true, as above stated, that in order to convict a man of an offense, that offense must be completely averred in the indictment, and the evidence must correspond with and support the whole of the material averments, yet it by no means follows that it is necessary to prove the offense charged in the indictment to the whole extent laid; for it is fully settled that in criminal cases it is sufficient for the prosecutor to prove so much of the charge as constitutes an offense punishable by law." "The same distinction applies to the averments in the indictment. If an offense sufficient to maintain the indictment be well laid, it is enough, though other matters which would increase the offense are ill averred."

Applying this law to the case before us, the correctness of the decision below is manifest. The indictment charges that the defendant kept more rooms than one to be used for gaming. But if he kept one he was guilty of the offense. So it charges that he kept said rooms for a certain long period of time; but if he kept them, or any one of them, for such a purpose, for any length of time, the offense was complete. And in *Armstrong v. The State*, 4 Blackf. 247, it is decided that a jury may infer that a house is kept for gambling from the fact that the owner once permits gambling in it.

The bill of exceptions further states that after the verdict against the defendant was returned into Court he moved for a new trial, "because the verdict was contrary to the law and the evidence; that the evidence in this

case given to the jury as to losing or winning money was that the witness saw money on the table, but did not state whether money was lost or won.”

Nov. Term,
1852.

McALPIN
v.
THE STATE.

The Court denied the motion.

No ground was shown for a new trial, and the Court did right, therefore, in refusing it.

The motion was based on the assumption that it was necessary, to make out the case, to show that gaming actually took place in the house kept for that purpose. Were that assumption correct, we think gaming might be inferred from circumstances, and that proof of the fact of losing or winning from actual observation would not be required; and such circumstances may have been proved in this case. But it appears by the case of *The State v. Miller, supra*, that it is not necessary that the fact of gaming having taken place in the house should be shown to make out the offense under the statute. The offense may be inferred from other circumstances. The point was raised in that case by way of objection to the indictment. The Court says: “The objection urged against the indictment is, that it does not allege that gambling had actually taken place in the room charged to have been kept for the purpose of gambling. This objection cannot be sustained. The offense created by the statute is the keeping or renting a room, &c., with the intention and purpose that gambling shall be carried on in it. The intention is a matter of proof; and if that can be established, it is immaterial whether the prohibited establishment shall find customers or not.”

Per Curiam.—The judgment is affirmed with costs.

J. W. Chapman, for the plaintiff.

D. S. Gooding, for the state.

Nov. Term,
1852.

THE STATE
v.
STAKER.

THE STATE v. STAKER.

Indictment, under the R. S. 1843, against *A. B.*, containing two counts.

The second, after the usual introduction, charged that the said *A. B.*, on, &c., at and in the county aforesaid, [the county of *P.*] did then and there knowingly keep and suffer his house in which he kept his grocery to be used and occupied for the purpose of gaming at and with cards for money and other valuable articles; contrary, &c. *Held*, that the indictment was sufficient.

It is error to quash an indictment containing a good count.

Tuesday,
February 1,
1853.

ERROR to the *Posey* Circuit Court.

PERKINS, J.—Indictment against *Dow Staker*, containing two counts, each charging that said *Staker* kept and suffered his house to be used for gaming.

Both counts were quashed below.

The second count alleges that the jurors aforesaid upon, &c., “do further present that the said *Dow Staker*, on, &c., at and in the county aforesaid, [the county of *Posey*,] did then and there knowingly keep and suffer his house in which he kept his grocery to be used and occupied for the purpose of gaming at and with cards for money and other valuable articles; contrary,” &c.

The decision of the Circuit Court, quashing this count, is justified by counsel on the ground that the offense charged is not set forth with sufficient certainty.

The part of section 100, p. 981, of the R. S., upon which this indictment is based, enacts that if any person shall keep his house to be used and occupied for gaming, he shall, on conviction, be fined, &c.

The count in question charges that the defendant did keep his house to be used and occupied for the purpose of gaming, &c. It sets out the offense substantially in the language of the statute, and shows further the character of the gaming for which the house was kept to be used, viz., with cards and for money, &c. This is more than sufficient as to the substance of the offense in a case like the present. *McAlpin v. The State*, at this term (1). But it is further objected that it does not appear that the house kept for gaming was situated in *Posey* county. We think

differently. The indictment charges, in effect, that in said county of *Posey* the defendant did there keep his house, &c. This seems to us to fix the locality of the house with sufficient certainty in the county of *Posey*.

There being one good count in the indictment the Court erred in quashing the whole of it.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

A. L. Robinson, for the state.

J. Pücher, for the defendant.

(1) See *ante*, p. 567.

Nov. Term,
1852.

BARRETT
v.
RUITT.

BARRETT v. RUITT.

If a plea be double, the plaintiff may demur to it for duplicity; but if he reply, he must answer both parts of the plea.

ERROR to the *Delaware* Circuit Court.

DAVISON, J.—*Scire facias* by *Ruitt* against *Barrett* to have execution from the Circuit Court, on a judgment of a justice of the peace.

Tuesday,
February 1,
1853.

The writ alleges that *Ruitt* recovered a judgment against *Barrett* before a justice of the peace for a certain sum; that a transcript of the judgment was filed with the clerk of the Circuit Court, recorded in the order-book of the Court, and entered on the docket of judgments therein; that afterwards a certificate of the justice was filed in the same office, stating that an execution had issued on the judgment, which was returned "no property."

There are three pleas—1st. That there is no such record of a judgment as set forth in the *scire facias*; 2d. That there is no such certificate on file in said office as set forth in the *scire facias*, and no such return was ever made as therein set forth; 3d. That *Barrett* had no lands in said county subject to execution.

The third plea was demurred to, and the demurrer properly sustained. Replications were filed to the first and

Nov. Term,
1852.

BARRETT
v.
RUITT.

second pleas;—to the first, that there is such record, &c.; and to the second, *precludi non*, because, he says, that there is such certificate on file, as set forth, and this he is ready to verify by the record, &c.

General demurrer to the replication to the second plea overruled.

The cause was submitted to the Court, and judgment for *Ruitt* that he have execution, &c.

The only question in this case is as to the sufficiency of the replication to the second plea.

The plaintiff contends that the replication is bad, on the ground that it professes to answer the whole plea, when it answers a part only. The plea is obviously double. It alleges—1st. That there is no such certificate, &c.; and 2d. That no such return was ever made, &c. The replication affirms that there is such certificate, but does not answer the latter branch of the plea.

We think the replication cannot be sustained. The certificate of the justice, as set out in the *scire facias*, would not, when denied, be proof that a legal return of *nulla bona* had been made; consequently, that part of the plea traversing such a return, sets up a bar to the *scire facias*. *Henkle v. German*, 6 Blackf. 423.

The plea being double, *Ruitt* could have demurred specially for duplicity. But having failed to demur, he was bound to answer both parts of the plea. *Neff et al. v. Powell et al.*, 6 Blackf. 420.

Per Curiam.—The judgment is reversed with costs. Cause remanded, &c.

W. March, for the plaintiff.

T. J. Sample, for the defendant.

FARRELL and Another v. THE STATE.

Nov. Term,
1852.FARRELL
v.
THE STATE.

An indictment for retailing spirituous liquor, charged the sale to have been made by A. and B. to C. The evidence showed that A. and B. had each sold spirituous liquor by retail to C., at different times, at the same bar and in the same house, but no joint sale was shown, nor that either participated in the act of the other. *Held*, that the indictment was not sustained.

ERROR to the *Vanderburgh* Circuit Court.

Tuesday,
February 1,
1853.

DAVISON, J.—This was an indictment against *John Farrell* and *Patrick Boyle* for retailing spirituous liquor without license.

There were two counts in the indictment. The second count was, on motion, properly quashed.

The first count charges, that *Farrell* and *Boyle*, on, &c., at, &c., bartered and sold two gills of spirituous liquor to one *Samuel T. Jenkins*, for the sum of two half-dimes, they, the said *Farrell* and *Boyle*, then and there not having a license, according to the laws in force at the time, permitting them so to do, &c. Plea, not guilty.

The cause was submitted to the Court, and the following evidence was given on the trial, viz.: It was proved by *Samuel T. Jenkins*, that within six months next before the finding of the indictment, he had purchased spirituous liquor, by a less quantity than a quart at a time, from each of the plaintiffs, separately, at the same bar and in the same house; but he never purchased any from both of them; that he did not know that they were partners in the business, at the time he purchased the liquor; but the business of the house and bar in which he bought the liquor was always done in the name of *Farrell*, and he supposed that *Boyle* was hired by *Farrell* to do business for him. It was also proved by the city clerk of *Evansville*, that the business of said house was always done in the name of *Farrell*, and that all licenses granted for vending spirits in that house were granted to *Farrell* alone.

The Court, upon the above evidence, found *Farrell* and *Boyle* guilty. Judgment for the state.

Nov. Term,
1852.

ROGERS
v.
EVANS.

The finding of the Court cannot be sustained. The charge in the indictment is, that the sale of spirituous liquor to *Jenkins* was the joint act of *Farrell* and *Boyle*; while the evidence proves that a joint sale was not made; that the several sales to him were made by them separately, and at different times. Nor was it shown that either of them, in any way, participated in the act of the other.

We think there is a fatal variance between the charge as laid in the indictment and the evidence adduced to support it. 2 Russell on Crimes, 711.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

J. G. Jones, for the plaintiff.

D. S. Gooding and *A. L. Robinson*, for the state.

3 574
124 108

ROGERS and Others v. EVANS.

A sale of land made by a vendor during the pendency of a suit against him, by collusion with the vendee, to prevent the collection of an anticipated judgment, will be set aside in equity, as against the vendee or his fraudulent assignee, upon the application of the judgment-creditor; and the fact that the vendee paid a full consideration for the land will make no difference.

To make the deed of a fraudulent grantor valid in the hands of the purchaser, as against the creditors of the grantor, it is not enough for him to show that he has paid an adequate consideration; but he must show, in addition, that he made the purchase in good faith, innocent of any knowledge of or participation in the fraudulent designs of the vendor.

Tuesday,
February 1,
1853.

ERROR to the *Decatur* Circuit Court.

ROACHE, J.—This was a bill in chancery, filed in the *Decatur* Circuit Court by *William Evans*, the complainant below, against *Thomas J. Rogers*, *John Rogers*, and *Robert McCleary*.

The material allegations in the bill are, that *Evans*, on the 10th of *May*, 1842, commenced an action of slander, in the *Decatur* Circuit Court, against *John Rogers*, and on the 12th of *November*, 1842, recovered a judgment for 850

dollars and costs; that during the pendency of that suit, and only a short time before the rendition of the judgment, to-wit, on the 13th of *October*, 1842, said *John* conveyed his land, situate in *Decatur* county, to his brother, *Thomas J. Rogers*, who lived in *Boone* county, for the purpose of defrauding the complainant and preventing him from subjecting said land to the payment of any judgment he might obtain in the slander suit; and that *Thomas J.* accepted the deed for the purpose of assisting his brother in perpetrating his contemplated fraud, with a full knowledge of the pendency of the slander suit.

Nov. Term,
1852.

ROGERS
v.
EVANS.

The bill further alleges that the defendant, *McCleary*, purchased the land from the said *Thomas J.* during the pendency of this suit, with a full knowledge of all the foregoing facts, and of the fraudulent designs of both the other parties; that the said *John* had no other property of any description out of which said complainant's judgment could be made.

The prayer of the bill is, that the conveyances should be set aside as fraudulent and void as against the complainant, and that the land should be subjected to execution on his judgment.

The bill was taken as confessed as to *McCleary*.

The defendants, *John* and *Thomas J. Rogers*, filed answers under oath.

The answer of *John* admits the pendency of the slander suit, the judgment therein, his ownership of the land, and his conveyance to his brother *Thomas J.*, as stated in the bill, and that he has no other property; but denies the charges of fraud; avers that at the time of the sale to his brother he had no apprehension that *Evans* would recover any judgment against him; and insists that the sale was made by him in good faith; that the price for which he sold the land, 700 dollars, was its full value; that his brother gave him two notes for 350 dollars each, the one due in two, the other in five years from date, on the first of which he entered a credit, at the time, of 50 dollars, which he owed his brother.

The answer of *Thomas J. Rogers* denies all knowledge

Nov. Term,
1852.

ROGERS
v.
EVANS.

of the pendency of the slander suit, at the time of his purchase of the land, and alleges that he gave full value, &c., in the manner and on the terms mentioned in the answer of *John Rogers*, and avers that he acted in good faith, without fraud, &c.

The cause came to a hearing on the bill, answers, default of *McCleary*, exhibits, and depositions, and a decree was rendered in the Court below, in accordance with the prayer of the bill, setting aside the conveyances, and subjecting the land to execution.

There is no question of law involved in this case, which has not been settled by repeated adjudications in this Court. The depositions are very full and explicit, and abundantly sustain all the material allegations of the bill. They clearly establish that *John Rogers* executed the conveyance to his brother for the purpose of placing the land beyond the reach of any judgment *Evans* should recover in the slander suit. It is equally clear that *Thomas J. Rogers* was well aware of the pendency of that suit at the time of his purchase, and participated with his brother *John* in his fraudulent purpose.

The counsel of the appellants insist that the fact that *Thomas J.* agreed to pay the full value of the land, rebuts the charge of fraud on his part. There is no satisfactory evidence of the payment of the consideration alleged to have been agreed on. But this is immaterial. Even if he had shown that he had actually paid a fair price for the land, in cash, it would not avail him. For his knowledge of the object of his brother in making the deed, and his participation in the fraudulent intent, renders his purchase voidable at the suit of a creditor. To make the deed of a fraudulent grantor valid in the hands of the purchaser, as against the creditors of the grantor, it is not enough for him to show that he has paid an adequate consideration; but he must show, in addition, that he made the purchase in good faith, innocent of any knowledge of, or participation in, the fraudulent designs of the vendor. *Wright v. Brandis*, 1 Carter's Ind. R. 336.—*Ba-sye v. Daniel*, id. 378.—14 Johns. R. 493 (1).

Per Curiam.—The decree is affirmed with costs.

J. S. Scobey, for the plaintiffs.

A. Davison, for the defendant.

Nov. Term,
1852.

BALL
v.
CARLEY.

(1) *DAVISON, J.*, having been concerned as counsel, was absent.

BALL v. CARLEY.

If the minutes of evidence taken by counsel should be surreptitiously introduced into the jury-room by the procurement of his client or the connivance of a juror, and should be there read and used as a basis for arriving at a verdict, or should otherwise influence the finding of the jury, it would be good cause for setting aside the verdict and awarding a new trial; but where such minutes have got before the jury by accident and have not influenced their verdict, it will not be.

APPEAL from the *Tippecanoe* Court of Common Pleas. *Tuesday, February 1, 1853.*

ROACHE, J.—*Ball*, as administrator of *Herron*, filed his bill in chancery in the Court of Common Pleas of *Tippecanoe* county, alleging that at the previous term of the Court he had impleaded the said defendant, *Carley*, in an action of assumpsit, damages 3,000 dollars; that issue being joined, there was a jury trial, and a verdict and judgment for the plaintiff for 33 dollars; that upon the retiring of the jury to consult of their verdict, a vote was taken for the purpose of ascertaining their several opinions, and that the greater number expressed themselves in favor of finding for the plaintiff various sums ranging from 400 dollars to 600 dollars; that thereupon, one of their number, *Daniel Brawley*, drew from his pocket a memorandum of the evidence given in the cause, in the handwriting of *Chase*, one of the defendant's attorneys, and declared that it contained a correct statement of the evidence; some of the jurors objected to the reading of the memorandum; but it was, notwithstanding, read and re-read, and exerted such an influence upon the minds of the jurors as to reduce their verdict at least 400 dollars;

Nov. Term,
1852.
— — — — —
BALL
v.
CARLEY.

that these facts were unknown to the complainant until after the adjournment of the Court, at the close of the term, so that he had no opportunity of availing himself of them, on a motion for a new trial. He further alleges that he was entitled to a judgment of at least 1,000 dollars, which he would have obtained but for the improper use made by the jurors of the memorandum of evidence. Prayer for a new trial.

Carley answered, under oath, denying that the complainant was entitled to any judgment in the suit at law, or that he had any ground to claim a new trial. He denies that there was any improper conduct on the part of the jury, or of any one else, which influenced their finding or prejudiced the complainant.

There is a written agreement, signed by counsel, admitting that the "memorandum" did not go to the jury with the knowledge or consent of the parties, or their attorneys.

Both parties took depositions. The cause went to a hearing, and the bill was dismissed.

The only question in the cause arises upon the proof. If the charges in the bill were established—if it were true that the minutes of evidence taken by counsel had been surreptitiously introduced into the jury room, by the procurement of the party, or by the still more reprehensible connivance of a jurymen, and had there been read and used as a basis for arriving at a conclusion, or had even exercised an influence upon their finding, it would certainly be good cause for setting aside the verdict and awarding a new trial. Such gross misconduct would justly subject the guilty parties to punishment, which no Court should hesitate to inflict. See *Barlow v. The State*, 2 Blackf. 114, and authorities there cited. But upon looking into the depositions, we cannot conclude that there was any such misconduct in this case. We are satisfied, from the evidence, that the "memoranda" came into the jury room by an accident; that no improper use was made of them, and that they exerted no influence upon the verdict. The only evidence bearing on the point materially is found in

the depositions of the bailiff and of two of the jurors, one of whom was the foreman. The evidence of the bailiff goes strongly to support the allegations of the bill relative to the improper use made of the "memoranda." In his statements, he is positively contradicted by both the jurors. *Smiley*, who was the foreman, swears that the jury made up their verdict "from their recollection of what was proved at the trial," and without any reference, as far as he saw, knew, or believed, to the "memoranda" of evidence. *Brawley*, the other juror, sustains him fully, and, in addition, explains how the paper found its way into the jury room. He says, that when the jury were retiring, he gathered up from the table in the Court room, the papers in the cause, and upon drawing them out of his pocket, after arriving in the jury room, he discovered several sheets of paper containing minutes of evidence, one in the hand-writing of *Chase*, the defendant's attorney, and two in the hand-writing of *Jones*, one of plaintiff's counsel. He swears positively that he took up these papers inadvertently, and, upon finding them, made the fact known to his brother jurors, and that they did not, in any degree, affect the verdict.

We are of opinion, therefore, that no improper means were used to introduce the paper complained of into the jury room, nor was it used or relied upon as evidence, nor did it, to any extent, influence the minds of the jurors in coming to a conclusion.

Per Curiam.—The decree is affirmed with costs.

D. Mace, for the appellant.

H. W. Chase, for the appellee.

Nov. Term,
1852.

BALL
v.
CARLEY.

Nov. Term,
1852.

LINDVILLE
v.
THE STATE.

LINDVILLE v. THE STATE.

The Courts of Common Pleas have jurisdiction, by the act establishing them, of felonies which are not punishable with death, where the party charged with the crime is in custody at the time, or where, before indictment found in another Court, he has voluntarily submitted to the jurisdiction of the Court of Common Pleas either by personal appearance or in writing.

After the act establishing Courts of Common Pleas took effect, but before the R. S. 1852 went into force, a complaint for a felony not punishable with death, containing the substantial requisites prescribed by the statute, was filed in the Court of Common Pleas; but the complaint was denominated in the body of it an "information." *Held*, that the sufficiency of the complaint was to be determined by the act establishing the Court. *Held*, also, that the name given to the complaint did not change its legal effect.

A person charged with the commission of a crime should be allowed a reasonable time to prepare his defense.

Tuesday,
February 1,
1853.

ERROR to the *Jackson* Court of Common Pleas.

STUART, J.—This was a trial on a charge of felony without the intervention of a grand jury. The proceeding was had under the statute establishing the Court of Common Pleas and defining its jurisdiction. The affidavit preferring the charge contains the material allegations of a good indictment. No objection is taken to it in point of form or technical precision.

It appears from the record that *Lindville* was in custody. He was arraigned in the Common Pleas, and pleaded the general issue. Trial by jury and verdict of guilty. Motion for a continuance on an affidavit filed before trial, and also motions for a new trial and in arrest of judgment, severally overruled, and judgment on the verdict. *Lindville* now prosecutes his writ of error.

Three objections are taken to this proceeding:

1. That the Court of Common Pleas has no jurisdiction in cases of felony;
2. That the proceeding by information is one unknown to and unauthorized by the law;
3. That the Court erred in refusing to grant a continuance on the affidavit filed.

It may be observed generally that the act to establish

Courts of Common Pleas contains many incongruities and repetitions. So do other important statutes. The chief cause of these discrepancies is, that the unity of design of most of our legislation is destroyed by amendments. The structure of the statute before us clearly evinces that such has been its history. Taking it as we find it, we must reconcile and give effect to its several provisions, if they can be reconciled and made operative. To this end it is proper to consider the reasons for its enactment.

The Common Pleas takes the place of the Probate Court, only with enlarged powers and jurisdiction. The legislature evidently intended it to be a Court of greater dignity and efficiency than that which it had supplanted. In addition to the probate business, a limited civil and criminal jurisdiction was conferred. It was supposed that, by this means, justice would be more speedily administered, the Circuit Court relieved from the pressure of the numerous cases cognizable in the new Court, and the delays incident to the semi-annual terms of the one obviated by the quarterly sessions of the other.

Both in civil and criminal cases delay and its consequences had become a great evil. Some Circuit Court dockets numbered from 300 to 500 cases. The time of that Court was chiefly occupied in the trial of petty offenders, while the important civil business was continued over from term to term at a ruinous expense to litigants. In this way the larger commercial points particularly suffered. Nor was the end for which the time of the Court was thus spent successfully attained. Offenders committed at the close of one term in default of bail, had to be kept in prison till the next term. When the six months' Court rolled round, the witnesses who, had the trial been brought on in a reasonable time, could have been easily procured, were scattered; a link in the evidence was gone; and an acquittal was the consequence. It would be difficult to express the dissatisfaction felt in some parts of the state towards a system thus seemingly devised to facilitate escape. That the county

Nov. Term,
1852.

LINDVILLE
v.
THE STATE.

Nov. Term,
1852.
LENDVILLE
v.
THE STATE.

should be at the expense of keeping the prisoner six months, at the expense perhaps of guarding the jail, the expense of a grand jury, the expense of a public trial, and, in most instances, under the appointment of the Court, the expenses of an attorney to defend the accused; and all this expensive machinery to effect almost inevitably the acquittal of the prisoner, however guilty; constituted altogether such a vicious, inefficient system of criminal jurisprudence as eminently needed remedial legislation.

The grand jury, whether justly or not, had impaired its standing in public confidence. Its alleged abuses led to the provision in the new constitution authorizing the legislature to modify or abolish the system. Accordingly, the grand jury was modified, depriving it of cognizance over misdemeanors, and, in certain contingencies, over felonies. To meet these emergencies—to administer justice in criminal cases more speedily, more efficiently, at less expense, and without the intervention of a grand jury, the Common Pleas was established.

Such being some of the mischiefs and such the remedy, it is our duty to give effect, if possible, to all the powers with which the legislature has clothed the new Court. This prepares the way to examine the objections in their order.

1. "The Common Pleas has no jurisdiction in cases of felony." To sustain this objection the 14th and 16th sections of the act under consideration are referred to. Had the jurisdiction conferred stopped with these sections, the objection would seem to be well taken. The intention to exclude felonies would scarcely admit of doubt. That such was the original purpose of the framers of the bill is perhaps historically true. The disjointed connection of the context favors that supposition. The 17th and 18th sections seem like hasty amendments. The 17th section expressly confers jurisdiction in certain specified cases, in these words, viz.: 1st. "Any person charged with a felony who is in custody at the time, and," 2d, "any one charged with a felony who, before in-

dictment found by a grand jury in any other Court, voluntarily, either by personal appearance or in writing, submits to the jurisdiction," &c.

Nov. Term,
1852.

LINDVILLE
v.
THE STATE.

Thus stand these sections considered separately. It is necessary to consider them collectively, in order that the true intent of the legislature may be deduced.

Regarded thus, how are they to be reconciled? Simply in this way: The 14th section was intended to confer jurisdiction over misdemeanors. This class of offenses is the subject-matter of the section. The word *felony*, as there used, and as explained in the context, is not in exclusion of that class of offenses altogether, but only in suspension, so far as that section is concerned, of any provision in relation to felony. It is as though the law-givers had said, we will reserve the qualified jurisdiction which we mean to confer on the new Court over felony for a separate section. Accordingly, the subject-matter of the 17th section is felony. Under the specified contingencies, the party "*shall* be put on trial in the Common Pleas,"—"the Court *shall* appoint an early day for trial," &c. This is a language already too clear for comment.

So with the 16th section. It may be paraphrased thus: If, in the progress of a trial, the evidence discloses such a felony as treason or murder, further proceedings shall be stayed, &c. By this construction, no violence is done to language. The several parts fall in with each other, not very logically it is true, yet with sufficient unity to indicate the legislative intention.

It remains to inquire, under the first objection, how *Lindville* came into the Court that tried him? It appears from the record that he had been committed after a preliminary examination, probably for want of bail. At all events, he was "charged with a felony;" he was "in custody at the time;" the crime charged was not "punishable with death." He was thus within the very terms of the statute. He was also within the mischief, if it may be so called, to which we have already alluded. His was a fitting case to illustrate the remedy which the Common Pleas was established to supply, namely, to save public

Nov. Term,
1852.

LINDVILLE
v.

THE STATE.

expense, to secure witnesses while they are yet to be had and while the transactions were yet fresh in their memories; and, in the spirit of the new constitution, to administer justice "speedily and without delay." We therefore conclude that the objection to the jurisdiction is not well taken.

The second objection is, that "the proceeding by information is one unknown to and unauthorized by the law." The R. S. of 1852, which provide for informations, were not then published. The case must be governed by the statute in force at the time the alleged crime was committed. The act in relation to Common Pleas was published "by authority" in pamphlet form in *October*, 1852. The crime is alleged to have been committed in *January*, 1853. Under that act the case is to be decided. There is nothing in it about "informations," not even the word itself. By the 15th section "all criminal proceedings may be commenced in said Court by filing with the clerk a written charge, verified by affidavit," &c. By the 17th and 18th sections this mode of procedure is extended to felonies, and without the intervention of a grand jury. In one of these sections, the accusation is called a "complaint;" in the other, a "charge or complaint." The books define "information" to be a "charge, accusation, or complaint." It thus seems wholly immaterial which term is adopted. To change the name cannot change the legal effect. If the complaint filed be a substantial compliance with the statute which governs the case, it is sufficient.

The act itself gives the rule of construction. Section 19 provides that "in all criminal cases, the charge," &c., "shall be sufficient," &c., "if it be certain in its allegations to a common intent."

The Court are of opinion that the written "charge or complaint" contemplated by the statute is in this case well described as an information.

It is proper to add that the paper filed by the prosecuting attorney should be rejected as a nullity. There was no law at the time to authorize the filing of such an instru-

ment. The charge cannot be aided by the allegations of a separate paper, not sworn to and unknown to the law under which the trial was had. The word "information," in the record before us, must therefore be taken to mean the affidavit containing the charge, not the unauthorized paper filed by the prosecutor.

The third objection is well taken. The affidavit for a continuance is made part of the record by a bill of exceptions, and brings *Lindville* within the rule laid down in *Spence v. The State*, 8 Blackf. 281, and *Gross v. The State*, May term, 1850 (1). Persons charged with crime should be allowed a reasonable time to prepare their defense. The charge even before the magistrate, had, in this instance, been recently made. It is to be presumed that *Lindville* was in custody during the five days that intervened before his trial. The facts disclosed in his affidavit for a continuance, if true, affected materially the credibility of the witness. No great hardship could have resulted to the state, for it was in the power of the Court to appoint an early day for trial, either in term or in vacation. On this statutory provision the Court should have acted, and granted the defendant a reasonable time to prepare for trial.

Per Curiam.—The judgment is reversed. Cause remanded, &c.

W. T. Otto and D. H. Long, for the plaintiff.

F. Emerson, for the state.

(1) 2 Carter's Ind. R. 135.

Nov. Term,
1852.
LINDVILLE
v.
THE STATE.

END OF NOVEMBER TERM, 1852.

AN INDEX

TO THE PRINCIPAL MATTERS

CONTAINED IN THIS VOLUME.

ACCEPTANCE.

See *BILLS OF EXCHANGE*, 11, 12, 13, 14.

ACCORD AND SATISFACTION.

1. An offer by a creditor to his debtor to accept a thing in payment of the debt upon a condition which is not assented to by the debtor nor waived by the creditor, does not amount to an acceptance.—*Pra-ther v. The State Bank*, 356
2. The agent of a judgment-debtor, residing in *Jennings* county, sent to the creditor at *Madison*, notes of the state bank and treasury notes to be received at par in payment of the judgment, but no direction was given as to what should be done with the notes in case of the creditor's refusal thus to accept them. The latter refused to accept them at par, and promptly notified the agent of the non-acceptance, requesting further directions, but retained them for about two months, and then returned them. *Held*, that the delay could not be construed to imply an acceptance of the notes in payment of the judgment. *Ibid*.

ACKNOWLEDGMENT.

See *POWER OF ATTORNEY*, 2.

1. A certificate of acknowledgment to a mortgage, after certifying that the husband and wife had voluntarily executed the deed, was as follows: "The said wife having been by me examined separate and apart from her said husband, and the contents of the above deed being read and explained to her as the law directs, acknowledged the same to be her voluntary act and deed, without force or coercion from her said husband." *Held*,

that the certificate showed a legal acknowledgment under the R. S. 1843.—*Pardun et al. v. Dobesberger*, 389

2. The certificate of acknowledgment of a deed executed by husband and wife while the statute of 1824 was in force, was as follows: State of *Indiana*, *Tipppecanoe* county, ss. Before me, *D. B.*, recorder within and for said county, personally came *J. B.* and *R.*, his wife, the grantors named in the above deed of conveyance, and being by me examined concerning the same, acknowledged it to be their voluntary act and deed for the uses and purposes therein mentioned. And the said *R.*, the wife of the said *J.*, having been by me examined separate and apart from her said husband, as required by law, touching the above deed, declared that she signed, sealed, and delivered the same, of her own free will and accord, without any coercion or compulsion of her said husband, and that she thereby relinquished all her right and claim to dower in the said premises. In witness, &c. *Held*, that the certificate was sufficient under the statute of 1824.—*Davis et al. v. Bartholomew*, 495

ADMINISTRATORS.

See *EXECUTORS AND ADMINISTRATORS*.

ADMINISTRATOR'S SALE.

See *PLEADING*, 18.

1. An administrator's sale of real estate for the payment of debts, made by an order of the Probate Court, is not void from the circumstance that the record does not disclose that notice of the application to sell was given to the heirs.—*Doc d. Harkrider et al. v. Harvey*, 104

2. Notice in that case will be presumed. *Ibid.*
3. A sale of land by an administrator for the payment of debts, will not be set aside, at law, because the administrator himself became the purchaser. *Ibid.*

ADMISSION.

See ORDER, 1, 3.

AD QUOD DAMNUM.

See FERRIS, 5.

ADVANCEMENT.

1. If a father purchases land with his own money, and by way of advancement to his daughter takes the deed in her husband's name, no resulting trust arises in favor of the father.—*Baker v. Leathers et al.*, 558
2. If the father afterward purchases the land of the son-in-law, the advancement to the daughter cannot be deducted from the purchase-money. *Ibid.*

ADVERSE POSSESSION.

See LIMITATIONS, STATUTE OF, 3.

AFFIDAVIT.

The affidavits of individual jurors are not, on grounds of public policy, admissible to impeach their own verdict.—*Bennett v. The State*, 167

AGENT.

See PRINCIPAL AND AGENT.

AGGRAVATION.

See TRESPASS, 2.

ALIMONY.

Bill, under the R. S. 1843, to revise a decree for alimony, on the ground of its inadequacy for the support of the complainant and an infant daughter. The bill showed that the divorce was granted upon the complainant's petition, though for no fault of the husband; that the alimony decreed was in exact conformity to her request at the time of the divorce; and that she was permitted to retain, in addition, all the property she had brought to the husband, and some 300 dollars' worth of other property, which appeared to have been a liberal allowance. It did not allege that the husband had refused to make further allowances for the support of the complainant and child, but stated that the further allowances made

by him were small in amount and accompanied by inadmissible conditions, without stating the amount or conditions. *Held*, that a demurrer to the bill was correctly sustained.—*Gregg v. Gregg et al.*, 305

AMENDMENT.

See BILLS OF EXCHANGE, 12. PRACTICE, 3, 12, 24, 44.

1. The plaintiff will not be allowed, after verdict, to amend his replication, or to file an additional one.—*Redman v. Taylor*, 144
2. After the jury has been impaneled and the evidence heard, the plaintiff may, under the R. S. 1843, amend his writ and declaration by striking therefrom the names of any number of the defendants.—*Henry v. The State Bank of Indiana*, 216
3. In ejectment to recover the possession of land sold to the plaintiff's lessor upon execution, he was permitted by the Court at the trial to amend the executions upon which the land was sold to him. The record did not show what the amendments were. *Held*, that it must be presumed they were such as might properly have been allowed.—*Hutchens v. Doe d. Smith*, 528
4. Clerical mistakes made in the issuing of an execution may be amended by the judgment. *Ibid.*

ANSWER.

See CHANCERY, 6.

APPEAL.

See INJUNCTION, 2, 3, 4, 5, 6.

1. A justice of the peace, not being the successor of another justice, but having the docket of the latter in his possession during a vacancy or absence, cannot grant an appeal from a judgment on such docket, and certify a transcript in the case, until he has previously transferred the judgment to his own docket.—*Walker v. Prather et al.*, 112
2. A justice's certificate to a transcript given upon an appeal, showed that he was not the justice who rendered the judgment, but that the same was in his custody till a successor to the justice who did render the judgment, should be elected, and it did not show that the judgment had been transferred to his own docket. *Held*, that the dismissal of the appeal upon motion, in the Circuit Court, was right. *Ibid.*
3. If this defect in the certificate had not

been sufficient to justify the Court in dismissing the appeal, the refusal of the Circuit Court to admit evidence that the judgment had not been so transferred, would have been error. *Ibid.*

4. A plaintiff who has voluntarily abandoned his suit has no right to an appeal.—*The State Bank v. Hayes*, 400

APPRAISEMENT.

- A. became replevin-bail in 1840 upon a judgment against B. A's property was afterwards sold upon execution to satisfy the debt. In 1847, A. obtained a judgment against B. for the amount made by the sale of his property, and B's land was sold without appraisement to satisfy the same. *Held*, that as there was no law when A. became bail requiring the appraisement of land sold upon execution, the sale of B's land without appraisement was right.—*Trotter et al. v. Doe*, 129

APPRAISEMENT LAWS.

See JUDGMENT, 8.

ARBITRATION.

See AWARD. ASSESSMENT OF DAMAGES.

1. The *Madison Insurance Company* rejected the claim of the assured for the loss of the cargo of a flat-boat, and proposed to him to leave the matter to arbitration. The proposition was accepted in writing; whereupon the board of directors entered upon the books of the company a request to the assured to join the secretary of the company in selecting the arbitrators, designating the matter to be referred. The secretary and the assured accordingly selected the arbitrators, and the secretary executed a bond in the terms prescribed by the R. S. 1843, and signed the name and annexed the corporate seal of the company thereto. *Held*, that the arbitration intended was the statutory one provided by the R. S. 1843. *Held*, also, that the secretary was empowered by the board to execute and annex the seal of the company to the bond. *Held*, also, that the submission was a valid one.—*The Madison Insurance Company v. Griffin*, 277
2. A clause in the charter of the company provided that the business of the company might be carried on without the presence of the board of directors, by the president and secretary, subject to the by-laws, rules, ordinances, and regulations established by the board of directors. *Held*, that the board of directors having made the submission to arbitration, the president and secretary had no authority, under that clause, to revoke the submission. *Ibid.*
3. The award was, that the company should forthwith pay to the assured (naming him) the sum of 750 dollars and 74 cents, and that the same should be received in full satisfaction and discharge of his claim against the company, and that the company should pay the costs. *Held*, that the award was sufficiently certain. *Ibid.*
4. When a party has been represented by his attorney at an arbitration, he cannot afterward object that notice of the meeting of the arbitrators was not given to him. *Ibid.*
5. The matter submitted to arbitration was, "whether said company was liable to pay the assured the damage done to the flour and meal, or either, on board of said flat-boat, and the amount." The company, at the hearing, applied, upon the affidavit of her agent, for a continuance on account of the absence of three witnesses whose testimony, it was alleged, would tend to show that the damage was less than what the other witnesses had sworn. The arbitrators refused to adjourn the hearing, but proposed to hear the cause, with the exception of the evidence of those witnesses, and adjourn for a reasonable time, to be named by the company's attorney or agent, in order to procure the attendance and testimony of those witnesses; but the company refused a continuance on those terms. *Held*, that the conduct of the arbitrators, in this respect, could not be complained of. *Ibid.*
6. A rule was granted by the Circuit Court upon the company to show cause why judgment should not be rendered on the award of the arbitrators. The company appeared, and filed her reasons, not alleging, as a defense, the want of notice of the award. *Held*, that the notice was thereby admitted. *Ibid.*

ARBITRATORS.

See ARBITRATION, 4, 5. REFEREES.

ARREST.

See LAFAYETTE, TOWN OF. CONSTABLE. PRINCIPAL AND AGENT, 1.

ASSESSMENT OF DAMAGES.

See PRACTICE, 24.

In a suit upon the official bond of a school commissioner, after an interlocutory judgment for the plaintiff, the inquiry of damages was submitted, by agreement of the parties, to referees. *Held*, that the submission was authorized by the R. S. 1843.

—*Kintner et al. v. The State ex rel. Skelton*, 86

ASSIGNMENT.

See CONTRACT, 10, 11. EXECUTORS AND ADMINISTRATORS, 2. ORDER, 2. PROMISSORY NOTES, 9, 10, 11, 12, 13.

The assignment of a written contract for the sale of land, under the R. S. 1843, carried with it the legal title to the instrument, and upon a suit by the assignee for a specific performance, the assignor is not a necessary party.—*Colerick et al. v. Hooper*, 316

ASSIGNMENT OF ERRORS.

See PLEADING, 6, 7, 17. PRACTICE, 8.

1. The assignment of errors by the executor of a judgment-plaintiff, should contain an averment of the matter which makes the executor privy to the judgment, and establishes his right to sue; otherwise, the assignment will be objectionable on demurrer.—*Rundles et al. v. Jones*, 33
2. The plea *in nullo est erratum* to the assignment of errors of an executor, admits his representative character. *Ibid.*

ASSUMPSIT.

1. Special count in assumpsit on the following instrument: Received of *J. B.* the sum of 100 dollars paid in land. *Held*, that the receipt did not of itself show a contract implying a consideration. *Held*, also, that it did not of itself show a sufficient consideration for the alleged promise to pay *J. B.* 100 dollars on request. *Held*, also, that the instrument was so ambiguous on its face that no definite meaning could be given to it.—*Fiset v. Bonewitz*, 546
2. *A.* sold to *B.* a judgment, *B.* agreeing to discharge a debt of *A.* to *C.* in part payment. *C.* assented to the arrangement, released *A.*, and afterwards recovered a judgment against *B.*, in his own name, for the debt. *A.* afterwards sued *B.* for the identical money which *B.* had thus agreed to pay *C.* *Held*, that the suit would not lie.—*Smoot v. Dye*, 517

ATTACHMENT.

1. In a proceeding in foreign attachment, property of the absconding debtor must have been attached in the county where the writ of attachment was issued, or a person in that county summoned as a garnishee, before process can legally issue, under the R. S. 1843, to another county,

against a garnishee resident therein.—*Reinhard v. Keith*, 137

2. To authorize a judgment by default in a proceeding in foreign attachment, against a garnishee served with process in, and being a resident of, another county than that in which the writ of attachment was issued, it is necessary, under the R. S. 1843, that property of the absconding debtor shall have been attached, or a garnishee served with process, in the latter county. *Ibid.*
3. In a proceeding in attachment against a steam-boat, under article 2 of chapter 42 of the R. S. 1843, the giving of a bond for the discharge of the boat as authorized by the statute, operates virtually to set aside a previous judgment by default rendered against the boat.—*Carson et al. v. The Steam-Boat Talma*, 194
4. Where a judgment had been rendered by default against the boat and one of the defendants at the term of the Court next after the rendition of the judgment moved to set it aside, it was *held* that such defendant did not, by making the motion, waive any objection to the attachment. *Ibid.*
5. The giving of the bond for the purpose of having the boat discharged, is not a waiver of any objection to the attachment. *Ibid.*
6. The omission, in the affidavit on which the writ of attachment issues, of the name of the person who contracted the debt, is fatal. *Ibid.*
7. Proceeding in domestic attachment. Plea, that when the suit was commenced, and for 18 months previously, and from thence hitherto, the defendant was an inhabitant and resident of the territory of *Wisconsin*, &c. To support the plea, it having first been proved that the defendant had left *Allen* county, in this state, some two years previously to the commencement of the suit, evidence was received of the declarations of the defendant when he left that he was going to some of the western territories, and of his intention as to returning. *Held*, that the evidence was admissible as a part of the *res gesta*.—*Burgess v. Clark*, 250

ATTORNEY.

See CONVEYANCE, 5. POWER OF ATTORNEY, 2.

ATTORNEY AT LAW.

1. The authority of an attorney at law determines by the death of his client.—*Rundles et al., Executors, v. Jones*, 35
2. An attorney at law against whom charges

have been preferred, under the statute, for mal-conduct in office, is not entitled to have the charges tried by a jury.—*Ex parte Robinson*, 52

3. An attorney at law to whom a claim has been sent for collection, and who has obtained a judgment thereon, cannot, without special authority, receive, by way of compromise, notes of third persons in satisfaction of the judgment.—*Jones et al. v. Ransom*, 327

AWARD.

See ARBITRATION, 3, 6.

1. The fraudulent concealment by a party to an arbitration, of a fact material to the defense of the adverse party, cannot be pleaded by the latter as a valid defense to an action at law by the former upon the award.—*The White Water Valley Canal Company v. Henderson*, 3
2. An award is sufficient, under the R. S. 1843, if signed by a majority of the arbitrators. *Ibid.*
3. By the provisions of the charter of the *White Water Valley Canal Company*, and also by the general statute, the award upon which this suit was brought was in the nature of a judgment of a justice of the peace, and, not having been appealed from, is conclusive. *Ibid.*
4. In an action against the *White Water Valley Canal Company* upon an award of damages for injury done by the latter to the plaintiff by entering upon his land and taking materials for the construction of the canal, the defendant offered to prove, as an offset to the damages claimed by the plaintiff, that, at the time of committing the injuries complained of, the premises were the real estate of one J., who was the owner of a large tract of land of which said premises were a part, and that the arbitrators, in determining upon their award, refused to take into account the benefits and advantages to the whole of said tract, while owned by J., resulting from the construction of the canal. *Held*, that the Circuit Court properly rejected the evidence. *Ibid.*
5. In a suit upon the bond of K., a school commissioner, breaches were assigned that during his first term, he received from the sale of school lands, and for interest on the loan of school funds, divers large sums, &c., and that he refused to render an annual account of the moneys received and disbursed during his said term. After an interlocutory judgment for the plaintiff, the assessment of damages was submitted, by agreement, to the award of arbitrators. The award re-

turned showed a specific amount found due from K. of principal and interest received and paid into the hands of K., on school lands sold and not accounted for, and of surplus revenue and interest received by K. and not accounted for; and the award also contained a separate assessment of damages in other cases against K. *Held*, that the award was sufficiently certain. *Held*, also, that it was not objectionable for containing the assessment of damages in other suits,—that being mere surplusage.—*Kintner v. The State ex rel. Skelton*, 86

6. A judgment upon the award of referees may properly include interest from the time of the award till judgment is rendered thereon. *Ibid.*

BAIL.

See HABEAS CORPUS. REFLEVIN BAIL.

BAILMENT.

See EVIDENCE, 16.

BASTARDY.

1. A complaint for bastardy is not bad for omitting to allege that the complainant is a resident of the county where the suit was commenced.—*Neff v. The State, &c.*, 564
2. Where the state appeals from the judgment of the justice in a case of bastardy, no appeal-bond is necessary. *Ibid.*
3. If the defendant appears upon the appeal, and submits to a trial by jury, he cannot afterward object that the appeal was improperly taken. *Ibid.*
4. The judgment for the complainant in a case of bastardy, was in this form: It is considered, &c., that for the maintenance of the said bastard child, the said plaintiff recover against the defendant to and for the use prescribed by law, &c. *Held*, that the judgment was substantially good. *Ibid.*
5. The judgment in a case of bastardy ordered the first instalment thereof to be paid at a future day, and in a subsequent clause execution was awarded "forthwith" to collect said instalment. The Supreme Court *held* that this last clause did not affect the rest of the judgment; but they reversed the judgment in that particular without costs. *Ibid.*

BILL OF EXCEPTIONS.

See PRACTICE, 6, 13, 14, 39, 76.

BILLS OF EXCHANGE.

1. A bill of exchange was drawn payable at Cincinnati, but the parties thereto were all residents of this state. *Held*, that the bill was within the meaning of the statute, which allows damages, upon the usual protest for non-payment, on bills drawn on persons without the jurisdiction of the state.—*The State Bank v. Rodgers*, 53
2. A bill of exchange was sold to the *State Bank*, the plaintiff, at her branch in *Lawrenceburgh*, by two of the parties, who were partners, for their own benefit, the plaintiff knowing the bill to be an accommodation bill. The greater part of this bill was paid, just before it became due, by the sale of another to the plaintiff, and the application of the proceeds to the payment of the first. When the second became due, it was paid by the sale of another to the plaintiff, of like amount, and the application of the proceeds in like manner. This process of paying each preceding bill by another of like amount, continued through a series of bills, and up to the non-payment of that on which this suit was brought; and each bill, after the first, was purchased with the understanding that the proceeds were to be applied to the payment of the preceding one. The bills all varied in respect to the parties—there being some to each bill who were not parties to the others. Each was made payable in four months from the time of the sale thereof to the plaintiff, at Cincinnati, but the parties were all residents of this state. The plaintiff, when she purchased the bills respectively, charged and received interest thereon at the rate of 6 per cent. per annum and three-fourths of 1 per cent. exchange. The cost of transporting specie between *Lawrenceburgh* and Cincinnati, did not exceed, during all this time, 2 dollars upon the thousand. At the time these several bills were sold to the plaintiff, there was a standing rule of said branch, that no note should be discounted having more than ninety days to run. *Held*, that the transactions recited did not show a device of the plaintiff to exact usury. *Ibid.*
3. The *State Bank*, through her branch at *Lawrenceburgh*, purchased a bill of exchange drawn at *Lawrenceburgh*, payable at the *Lafayette* bank of Cincinnati. The bill was sent by said branch to said *Lafayette* bank, for collection, and it was protested on the 11th day of August, 1849, when it became due, for non-payment. On Sunday the 12th or Monday the 13th of that month, the cashier of said branch received from the notary, through the post-office, a letter containing notices of the protest, addressed to the drawer and indorsers severally. On the same day, the teller of said branch mailed the notice to the indorser, *Pate*, in a letter directed to him at his residence. There was no evidence that the branch had indorsed the bill to the *Lafayette* bank. *Held*, that the course pursued by the notary in enclosing the notices to the several parties to said branch, was in accordance with a practice sanctioned by the Supreme Court of Ohio, and was sufficient. *Held*, also, that the notice was mailed by the notary in due time.—*Pate v. The State Bank*, 176
4. The statute which enacts that no holder of a bill of exchange shall be permitted, at any term of the Circuit Court, to institute more than one suit upon such bill, prohibits the institution of separate suits on such bill at the same term, but not at different terms, of the Court.—*Billingsley v. The State Bank*, 375
5. The protest of a bill was written and signed on the day that payment was refused, but the notary did not affix his seal until several months afterwards, but before the trial of the suit against the indorser. *Held*, that the protest was completed in time. *Ibid.*
6. A. being indebted to the plaintiff in a certain sum, the latter, in order to obtain payment, purchased of him, at a fair price, a bill drawn payable at a bank in *New Orleans*, and applied the proceeds, with his consent, to such payment, having reason to believe when the bill was bought that it would be paid at *New Orleans* when it should become due. *Held*, that the transaction was not a loan, but a fair purchase of a bill of exchange. *Ibid.*
7. A bill of exchange drawn in this state, payable in another of the *United States*, is a foreign bill.—*The State Bank v. Hayes*, 400
8. A protest is necessary to charge the indorser of a foreign bill. *Ibid.*
9. In a suit against the indorser of a foreign bill, there being no evidence of a protest, the jury were instructed to find for the defendant. *Held*, that the instruction was correct. *Ibid.*
10. A bill of exchange drawn payable at the *Ohio Life Insurance and Trust Company*, Cincinnati, was described in a count in the declaration against the acceptors as payable generally. *Held*, that there was a variance.—*Alden et al. v. Barbour et al.*, 414
11. When a bill is made payable at a particular place, a general acceptance is, in legal

effect, an acceptance to pay at the place designated in the bill. *Ibid.*

12. A count in a declaration against the acceptors of a bill of exchange described the bill as drawn payable generally, and as accepted to be paid at the *Ohio Life Insurance and Trust Company, Cincinnati*. The bill offered in evidence, which corresponded with that described in other respects, was drawn payable at said *Ohio Life Insurance and Trust Company, Cincinnati*, but accepted generally. *Held*, that the variance might have been obviated, by amendment, under the R. S. 1843, at the trial, but it not having been done, the Supreme Court was bound to make the amendment, or regard it as made, and treat the bill as given in evidence under said count. *Ibid.*

13. The fact that a bill has been protested, does not prevent its being afterward accepted by the drawee.—*Stockwell v. Bramble*, 428

14. A bill, whether foreign or inland, may be accepted by parol as well as by writing. *Ibid.*

BOARD OF COMMISSIONERS.

See COMMISSIONERS, BOARD OF.

BOND.

See JOINT AND SEVERAL.

BREACH OF PROMISE OF MARRIAGE.

See MARRIAGE, PROMISE OF.

C.

CASE.

See CORPORATION, 1, 2.

CAUSE OF ACTION.

1. Suit against an administrator and his sureties, before a justice of the peace. The demand stated that the plaintiff was the widow of the intestate, and entitled, under the statute, to certain personal property of the estate, which property she had demanded of the administrator. That statement was filed, with a copy of the administration-bond, as the cause of action. *Held*, that, under the R. S. 1843, the cause of action was sufficient.—*Walker v. Prather et al.*, 112
2. The name given to an action, in a justice's Court, is, under the R. S. 1843, immaterial, and a statement of demand, though very informal, is sufficient.—*Taylor v. Webster*, 513

CERTIFICATE.

See APPEAL, 2.

CERTIORARI.

See PRACTICE, 44.

CHALLENGE.

See JUROR, 1.

CHANCERY.

See ALIMONY. DIVORCE. FRAUDULENT CONVEYANCE, 1, 4, 5. INJUNCTION. PLEADING, 18, 22, 23, 38. PRACTICE, 61. PROCESS, 2.

1. The proviso in the 11th section of the act of 1838 regulating the practice in suits at law, which enacts that if in any of the actions or suits enumerated in that section, judgment be given for the plaintiff and afterward reversed for error, a new action may be commenced within a year after such reversal, applies to suits in chancery as well as to actions at law.—*McKinney v. Springer*, 59
2. A party who has applied to chancery for relief and obtained a decree, when his remedy was exclusively at law, may, under said proviso, at any time within a year after the reversal of such decree for error, prosecute his action, for the same matter, at law. *Ibid.*
3. A judgment-creditor filed his bill to subject to sale for the payment of his judgment, land previously conveyed by the debtor to another creditor, to secure a prior judgment of the latter. The Court found a balance due on the older judgment, and decreed that the premises should be sold and the proceeds applied—first, to the payment of such balance; and, next, toward the satisfaction of the complainant's judgment. *Held*, that the complainant could not object to the decree.—*Lewis v. Matlock et al.*, 120
4. A bill will not lie by the children of an intestate before a final settlement of the estate and an order of distribution of the personal assets, against a third person for having received from the administrator personal property of the intestate, and wasted the same.—*Fillingim et ux. v. Wyllie et al.*, 163
5. A bond was executed in July, 1840, in pursuance of an act of the legislature, to the county of *Lagrange*, for the conveyance of twenty acres of land, to be laid off into out-lots, on the west side of the plat of the village of *Lagrange*, in consideration of the location of the county-seat in that village. In 1841, the obligors executed a deed, in alleged conformity

- with the bond, of twenty acres of land, particularly described therein, to A. and B., commissioners appointed to superintend the erection of public buildings in that county. In 1845, the commissioners of the county filed a bill in chancery for the correction of the deed as to the parties, and the deed was so corrected as to convey the land to the county agent for the use of the county. A bill was afterward filed by the board of commissioners and the county agent, to correct an alleged mistake in the description of the premises; but it was not pretended therein that there was any concealment, misrepresentation, fraud, or misunderstanding, at the time the deed was made, as to its contents. *Held*, that, under the circumstances, the latter bill would not lie. — *Hobbs et al. v. The Board of Commissioners of Lagrange County*, 183
6. The answer put in to a bill requiring an answer without oath, cannot operate as evidence for the defendant. — *Larsh v. Brown*, 234
7. A. mortgaged to the commissioners of the *Sinking Fund*, an 80 acre and a 70 acre tract of land, to secure a loan, and afterward deeded the 80 acre tract to B. Afterward, the following arrangement was made between A., B., and the commissioners: The latter agreed that if B. would pay 20 dollars on the mortgage, and execute a mortgage for 80 dollars on the 80 acre tract, the sum of 100 dollars should be credited on A.'s mortgage, and the 80 acre tract should be released from it. B. did so; and A. thereupon credited the amount of 100 dollars on the purchase-money. The commissioners, by carelessness, omitted to release the 80 acre tract from A.'s mortgage, and afterward sold both tracts for the non-payment of interest by A. on his mortgage, to one F., who afterward sold the same to the son and agent of A. B. having conveyed said 80 acre tract to C., and C. to D., the latter filed his bill to compel A.'s son to relinquish to him said 80 acre tract. A., and his said son, and C. and the commissioners were made defendants. The commissioners filed a cross-bill, offering to pay back the amount received at the sale, and praying that the sale might be set aside, &c. The Circuit Court decreed that A.'s son should convey the 80 acre tract to D. and the 70 acre tract to A. *Held*, that so much of the decree as required the conveyance of the 80 tract by the son to D., was right; but that the part of the decree requiring the son to convey to A. the 70 acre tract, was wrong—A. having not asked that it should be done, and no rights of third persons appearing to have intervened. *Held*, also, that B. and C. were not necessary parties to the suit. — *Ragan et al. v. Louer et al.*, 253
8. Where it is a part of the contract for the future conveyance of land, that the vendee shall labor for a specific period for the vendor, the vendee cannot entitle himself to the conveyance by tendering a sum of money, after the time fixed for the execution of the deed, as an equivalent for the non-performance of the labor; at least, unless the performance of it was prevented by the vendor. — *Brewer v. Thorp*, 262
9. A husband who comes into possession of moneys held by his wife in trust, whether as her administrator, or otherwise, is held as a trustee, and may be compelled, in chancery, to account for it. — *Keister v. Howe et ux.*, 268
10. A purchaser of land, whose deed is to be made upon the payment of several notes given for the purchase-money, cannot maintain a bill, filed after all the notes have become due, to enforce the execution of the deed, without showing a payment of all the notes, or a proper offer to pay them, or something equivalent. — *West v. Chase*, 301
11. A. contracted with B. to sell to him a lot in *Elkhart* county, for a certain sum in potter's ware, for the payment of which sum five notes were given. The contract was made in said county, where B. resided; but A. then, and when this suit was brought, resided in *Illinois*. The first three notes were paid to A. when they became due. When the last two severally became due, B. set apart at his manufactory, in said county, where he carried on the business of manufacturing potter's ware, a sufficient quantity of potter's ware to pay them. He, afterward, filed his bill to compel A. to execute to him a deed, but did not aver or prove a demand of the deed. *Held*, that by setting apart the potter's ware as stated, it became the property of A., and the notes were thereby paid. *Held*, also, that A.'s absence from the state was a sufficient excuse for B.'s not demanding a deed, had the demand been otherwise necessary. — *Ibid.*
12. When a bill in chancery is against adult residents of the state, who are personally served with notice, and the allegations of the bill are certain—especially if the subject matter of the allegations is of a certain and definite nature—a final decree, after a decree *pro confesso* upon a default, may be made without proof. — *Colerick et al. v. Hooper*, 316
13. Where, at the time of making a contract

- for the sale of land, the vendor has fraudulently misrepresented the quantity, a Court of equity, upon the application of the vendee, will rescind the contract.—*Yost v. Shaffer*, 331
14. Such vendor cannot, by afterward purchasing and tendering to the vendee a conveyance for an adjoining quantity sufficient to make up the deficiency, deprive the latter of the right to rescind the contract. *Ibid.*
15. A father who had made advancements to his other children, conveyed a tract of land to his sons A. and B., taking from them a note and mortgage to operate as a check upon their conduct and not to be collected, intending the land as a gift subject to the support of himself and wife. A. and B. supported the father and mother during their joint lives, and about four days before his death, the father delivered the mortgage and note to B., saying that he wished him to keep them till he, the father, and the mother were dead, and then the mortgage would be void. He had often said he did not wish A. and B. to pay anything for the land, but only to support their parents. A. and B. had also supported the mother since his death. The note and mortgage were afterward demanded of B. by the father's administrator and delivered up by B., under protest against the rightfulness of the demand and in ignorance of his legal rights; and the administrator filed his bill for the foreclosure of the mortgage. *Held*, that the bill would not lie.—*Sherman et al. v. Sherman*, 337
16. Bill by the administrator of L. against C. to restrain the collection of a judgment at law and for a decree for a new trial of the issues. The bill alleged that the suit at law was assumpsit for work and labor, commenced by C. against L. in his lifetime, and that C. obtained judgment, &c.; that at the trial the Court improperly refused to admit certain evidence offered by L. to prove the value of the work; that C. was permitted to give evidence which ought to have been rejected; that the jury disregarded certain evidence of payment offered by L. and rendered judgment for C. though nothing was due him; and that the Court refused a new trial. It was also alleged that bills of exception were taken to all these proceedings, and upon an appeal to the Supreme Court, the judgment was affirmed. *Held*, that a demurrer to the bill was correctly sustained.—*Edgerton, Administrator, v. Comstock*, 383
17. Bill of foreclosure against a mortgagor and subsequent mortgagee. Defendants defaulted. Decree that the mortgagor should, within, &c., pay the sum due on the complainant's mortgage, and that in default thereof the premises should be sold, the costs and the amount of the complainant's mortgage paid, and the residue of the proceeds of the sale brought into Court to await its further order. *Held*, that the defendants could not complain that the sum due to the subsequent mortgagee was not ascertained and directed to be paid out of the overplus left after the payment of the complainant's mortgage and costs.—*Pardun et al. v. Dobesberger*, 389
18. A decree of foreclosure which directs that the whole instead of only a part of the mortgaged premises shall be sold to satisfy the mortgage-debt, will be held to be correct where it does not appear that the premises were worth more than the amount of the debt.—*Phillips et al. v. Richards et al.*, 401
19. If A., for a good consideration, promises B. to pay him a debt due from C. to B., the remedy for a breach of the undertaking is at law and not in chancery.—*Eastman v. Ramsey*, 419
20. A Court of equity will not render a decree setting aside a conveyance of land made to hinder and delay creditors, where the bill does not pray for such decree. *Ibid.*
21. Where the subject-matter of a bill against husband and wife relates to the inheritance of the wife, a decree against both upon the answer of the husband on behalf of himself and the wife confessing the bill, is erroneous.—*Work et al. v. Doyle et al.*, 436
22. It is error to render a decree by default, in such a case, against a married woman. *Ibid.*
23. Bill in chancery by a replevin-bail to enjoin the proceedings upon an execution issued on the judgment and levied upon his property, on the ground that a prior execution issued on the judgment had been levied on property of the principal, a bond for the delivery of the property forfeited, and a judgment recovered against the principal and surety on the bond upon which an execution had been issued and a part of the judgment collected but not credited. *Held*, that the remedy, if any, was by a motion to set aside the execution.—*Cline v. Lowe et al.*, 527
24. Where the material facts alleged in a bill are admitted by the answer, but distinct facts are set up in avoidance, the burthen of proof is upon the defendant.—*Baker v. Leathers et al.*, 553

25. The Supreme Court will weigh the evidence in a suit in chancery where it is conflicting. *Ibid.*

CHANGE OF VENUE.

See JURISDICTION, 1.

CHARACTER.

See WITNESS, 1, 3, 4.

CLAIM AGAINST A DECEDENT'S ESTATE.

1. The admission of an administrator that a claim against the estate is just, or an order of the Probate Court that it shall be paid, is, under the R. S. 1843, a sufficient establishment of the claim.—*The State ex rel. Pierson v. Bowden*, 504
2. After the claim has been thus established, the creditor must make a demand of payment of the administrator, before suit can be maintained upon his bond for its non-payment. *Ibid.*

CLERICAL ERROR.

See PRACTICE, 12.

CLERK OF THE CIRCUIT COURT.

The clerk of a Circuit Court has no right to receive payment of a judgment otherwise than in gold and silver, without the authority of the owner of the judgment.—*Prather v. The State Bank*, 356

COMMISSIONERS, BOARD OF.

1. The board of commissioners of a county have jurisdiction of the claim of a physician for services rendered in a *post mortem* examination made at the request of the coroner, and the judgment rendered by the board on the claim, if brought before them according to the statute, is, while unreversed, conclusive.—*Gaston v. The Board of Commissioners of Marion County*, 497
2. To give the board jurisdiction of the claim, it is not necessary that it should be brought before them like a formal suit at law. *Ibid.*

COMMON PLEAS.

1. The Courts of Common Pleas have jurisdiction, by the act establishing them, of felonies which are not punishable with death, where the party charged with the crime is in custody at the time, or where, before indictment found in another Court, he has voluntarily submitted to the jurisdiction of the Court of Common Pleas

either by personal appearance or in writing.—*Lindville v. The State*, 580

2. After the act establishing Courts of Common Pleas took effect, but before the R. S. 1852 went into force, a complaint for a felony not punishable with death, containing the substantial requisites prescribed by the statute, was filed in the Court of Common Pleas; but the complaint was denominated in the body of it an "information." *Held*, that the sufficiency of the complaint was to be determined by the act establishing the Court. *Held*, also, that the name given to the complaint did not change its legal effect. *Ibid.*

COMPLAINT.

See COMMON PLEAS, 2.

COMPROMISE.

A promise to give something for the compromise of a claim, about which there is merely a dispute and controversy, and which is without legal foundation, will not sustain a suit at law.—*Jarvis v. Sutton*, 289

CONCEALMENT.

See SALE, 1.

CONDITION SUBSEQUENT.

Where land is devised upon a condition subsequent, the non-performance of the condition authorizes the heirs of the deviser to enter upon the land, and thus destroy the devise; but, until the entry, those holding under the devisee are entitled to the land.—*Throp v. Johnson et al.*, 343

CONFESSIONS.

Confessions made by a prisoner, after he has been professionally advised of their effect, are admissible in evidence against him.—*Hamilton v. The State*, 552

CONFUSION OF GOODS.

See SALE, 2.

CONSIDERATION.

See COMPROMISE. EVIDENCE, 10. LEASE, 5. PLEADING, 9, 40. USURY, 1.

An agreement by A. to discharge the balance of a judgment due him upon B.'s delivering to him a wagon at a time specified, is a sufficient consideration to support a promise by B. so to deliver it.—*Givan v. Swadley*, 484

CONSTABLE.

See REPLEVIN-BAIL, 3, 4, 5, 6.

A constable has authority, as a conservator of the peace, to arrest a person charged with a breach of the peace committed within his view, and to detain him a reasonable time for the purpose of taking him before a magistrate.—*Vandever v. Mattocks*, 479

CONSTITUTION.

1. Sections 22 and 23 of the 4th article of the new constitution of *Indiana*, are to be construed as operating prospectively.—*The State v. Barbee*, 258
2. Local laws which were in existence at the time said constitution took effect, and were not inconsistent with it, were expressly continued in force by it. *Ibid.*

CONSTITUTIONAL LAW.

1. Section 115 of chapter 53 of the R. S. 1843, is void as being contrary to the constitution of the *United States*.—*Donnell v. The State*, 480
2. It is error to convict a person under that section. *Ibid.*

CONSTRUCTION.

See LAWRENCEBURGH AND UPPER MISSISSIPPI RAILROAD COMPANY.

CONTINUANCE.

See ARBITRATION, 5. PRACTICE, 19, 38.

1. A prisoner indicted for a crime requested a continuance on account of the judge having been employed by him as counsel before his election to the bench; but the state waived any objection to the judge on that account. *Held*, that the continuance was properly refused.—*Hamilton v. The State*, 552
2. The prisoner then moved for a continuance in order to procure the testimony of an absent witness; but the state admitted that the witness would swear to the facts alleged in the prisoner's affidavit, but reserved the right to impeach her credibility. *Held*, that the motion was correctly overruled. *Ibid.*
3. The prisoner then moved for a continuance upon an affidavit stating that he was informed that morning only that one *H.* was to be introduced as a witness against him, and that he had, until then, believed that said *H.* was confined in jail in *Marion* county, and, therefore, did not deem it necessary to subpoena witnesses to impeach his testimony, and that if the

cause should be continued he could procure the attendance of witnesses whose names he could not then state, by whom he could prove that said *H.* was a man of bad general character and unworthy of belief, &c. *Held*, that the motion was rightly overruled. *Ibid.*

CONTRACT.

See DAMAGES. EVIDENCE, 16. FREIGHT. INFANT. LEASE, 4, 5. MARRIAGE, PROMISE OF. PARTIES, 1. SPECIAL PERFORMANCE, 2, 3. STATUTE OF FRAUDS, 1, 2. VENDOR AND PURCHASER, 15.

1. Where one has entered into a special agreement to perform work for another, and furnish materials, and has done work and furnished materials, but not in the manner stipulated by the contract; or where he has voluntarily abandoned the work before its completion; yet if the work done and the materials furnished are accepted and used by the other party, the latter is answerable to the amount where-by he is benefited, upon an implied promise to pay for the value he has received.—*McKinney v. Springer*, 59
2. But such amount cannot exceed the price which would have been allowed, under the contract, for the same amount of work, or quantity of materials, had the contract been fulfilled. *Ibid.*
3. The mode of ascertaining the real benefit received from the part performance of work, in cases like the present, is to estimate the whole work at the price fixed by the contract, and to deduct from that the amount requisite to complete the part of the work left unfinished. If any loss is occasioned by the unfinished part costing more in proportion than the whole was undertaken for, the loss must be borne by the party who originally contracted to do the whole. The amount to be allowed may, in some cases, be less than the proportion which the work done would bear to the cost of the whole, but cannot exceed it. *Ibid.*
4. It seems that the defendant may, in an action of this kind, reduce the amount to be recovered by showing that he sustained special damage by reason of the non-performance of the contract by the plaintiff, or he may waive the recoupment of such damages and bring a cross action to recover them. *Ibid.*
5. Where an entire job of work was to be done under a special contract, and the compensation was to be, on its completion, the conveyance of a lot of ground, and the workman, having done a part of the work, abandoned the contract, but the

- party for whom the work was done received and retained the benefit thereof, it was held that the value of the lot was to be considered as representing the compensation the workman was to receive, and from it should be deducted the amount necessary to make up the deficiencies of the other party in the completion of the contract. *Ibid.*
6. Where a building is in process of construction under a special contract, and additions or alterations are made, the original contract, unless it has been so entirely abandoned that it is impossible to trace it and to say to what part of the work it is applicable, is held still to exist, and to be binding on the parties as far as it can be followed. *Ibid.*
7. Where a party has sold and delivered chattels, or performed labor for another, under a special contract which he has failed to complete, and such part performance has been a benefit to the party receiving it, which benefit he has retained after the expiration of the time for completing the contract, an action on the *quantum valebat* or *quantum meruit* may be supported for the chattels delivered or the work done.—*Epperley v. Bailey*, 72
8. In such a case, the defendant may prove, by way of recoupment, whatever damages he has sustained by reason of the non-fulfillment of the special contract; or he may resort to a cross action to recover them. *Ibid.*
9. The measure of damages for the violation of a simple contract, where vindictive damages are not authorized, is the amount necessary to have put the party injured in as good a condition when the contract was broken as if he had not made the contract.—*Jones, Administrator, v. Van Patten*, 107
10. A contract, under the R. S. 1843, for the maintenance of the poor, imposes upon the party contracting to maintain them, a personal trust which he cannot assign.—*Burger v. Rice*, 125
11. An agreement by him to assign the contract is void as against public policy. *Ibid.*
12. A. became replevin-bail in 1840 upon a judgment against B. A's property was afterward sold upon execution to satisfy the debt. In 1847, A. obtained a judgment against B. for the amount made by the sale of his property, and B's land was sold without appraisement to satisfy the same. Held, that as there was no law when A. became bail requiring the appraisement of land sold upon execution, the sale of B's land without appraisement was right.—*Tervis et al. v. Doe*, 129
13. Where a mechanic undertakes to do a job of work for a specific sum, within a time appointed by contract, and, having done a part, fails to complete the rest within the time appointed, by reason of which the employer is compelled to hire another to complete it, the employer has the right, if the hire of the mechanic last employed exceeds the price agreed upon by the contract for the same work, to deduct such excess from the amount due, according to the contract price, to the first mechanic, for the work actually done by him.—*Mansville v. McCoy*, 148
14. The employer has also the right, if the work done under the contract was executed in an unworkmanlike manner, to have the amount which it was worth less than if done in a workmanlike manner, deducted from the contract price for the same work. *Ibid.*
15. The employer has also a right, upon suit brought by the first mechanic for the work done by him, to show (at least, if he has pleaded or given notice of the defense,) other special damages which he has sustained by the plaintiff's breach of the contract. *Ibid.*
16. If the work has been done in an unworkmanlike manner, but no damages have resulted from its non-completion at the time appointed, and the expense of finishing it has not exceeded the contract price for the same work, the plaintiff should recover the reasonable value of the work done by him, according to its quality, not exceeding the contract price for the same. *Ibid.*
17. If an employer, upon his own judgment, furnishes a mechanic defective materials for a job, and directs them to be used at all events, he cannot afterward object that the work, on account of the defectiveness of the materials, is of an inferior quality. *Ibid.*
18. A judgment was rendered by a justice of the peace, while the statute of 1838 was in force, by the consent of the defendant, bearing 10 per cent. interest. Held, that this was not a valid contract under that statute for the payment of that rate of interest.—*Berry v. Makepeace*, 154
19. A son-in-law, living with the parents of his wife, cannot recover for occasional services performed in that capacity, without proof of an express contract that they were to be paid for.—*Oxford, Administrator, v. McFarland*, 156
20. A plaintiff cannot recover upon a spe-

- cial count for the non-performance of a written agreement, if the evidence shows that he failed to fulfil his part of the agreement.—*Heaston v. Colgrove*, 265
21. A defendant, sued upon a parol contract, may prove, by way of recoupment, any damages he has sustained by the breach of the contract by the plaintiff, if he has pleaded or given notice of such defense. *Ibid.*
22. Where a written instrument contains all the facts of a contract, except such as may be proved by parol, it is sufficiently certain to be enforced.—*Colerick et al. v. Hooper*, 316
23. The assignment of a written contract for the sale of land, under the R. S. 1843, carried with it the legal title to the instrument, and upon a suit by the assignee for a specific performance, the assignor is not a necessary party. *Ibid.*
24. An agreement by A. to discharge the balance of a judgment due to B. upon B.'s delivering to him a wagon at a time specified, is a sufficient consideration to support a promise by B. so to deliver it.—*Givan v. Swadley*, 484
- tain covenants of warranty. *Held*, that the part of the deed above recited conveyed the mill-privilege and premises described therein, to K. and his heirs, in fee-simple.—*Kenworthy v. Tullis et al.*, 96
2. The clause recited, saying, "the said M. H. doth hereby bind himself, his heirs," &c., "to ratify and confirm to the said L. K., his heirs, and assigns, the aforesaid privilege," &c., does not appear to have been intended to operate as a covenant, but to constitute a part of what, in a more formally drawn instrument, would be called the *habendum* and *tenendum*. *Ibid.*
3. The thing, and the estate granted by a deed, may be granted either by words contained in the *premises*, or in the *habendum* and *tenendum*. *Ibid.*
4. An instrument purporting to convey land in this state, in order to be effectual, must be executed according to our law.—*Butterfield et al. v. Beall*, 203
5. A deed made by an attorney under a power executed by his principals (valid as to the husbands who executed the same but invalid as to their wives,) was as follows: This indenture made, &c., between A. B., of, &c., attorney in fact for C. D. and E. D., his wife, and F. G. and E. G., his wife, parties of the first part, and J. K., of, &c., of the second part, witnesseth, that the said A. B., party of the first part, in consideration of, &c., to the said party of the first part by the said party of the second part in hand paid, &c., hath granted, bargained, and sold, &c., unto the said party of the second part, all the following described piece or parcel of land, (describing it,) being in the county of Ripley and state of Indiana, &c. To have and to hold, &c. And the said party of the first part, his heirs, executors, and administrators the aforesaid tract, &c., to the said J. K., his heirs, &c., will forever warrant and defend. In witness whereof the said A. B., attorney, hath hereunto set their hands and seals the day and year, &c. C. D., [seal]. E. D., [seal]. F. G., [seal]. E. G., [seal]. By A. B., [seal], their attorney in fact. The deed was attested by two witnesses, and the justice before whom the acknowledgment was taken, certified that A. B., "attorney aforesaid," personally appeared before him, and "acknowledged the foregoing instrument of writing to be his voluntary act and deed." *Held*, that the deed of the attorney was sufficient to convey the estates of the husbands. *Ibid.*

CONVEYANCE.

See ACKNOWLEDGMENT. DOWER, 4, 5, 6, 7. HUSBAND AND WIFE, 1, 2. POSSESSION. POWER OF ATTORNEY. SPECIFIC PERFORMANCE, 1. VENDOR AND PURCHASER, 22.

1. A deed of conveyance was as follows: "This indenture, &c., witnesseth, that M. H., in consideration of, &c., paid, &c., by L. K., hath granted, bargained, sold, and conveyed, and, by these presents, doth grant, bargain, sell, and convey unto the said L. K., the free privilege to enter upon a certain tract or piece of land claimed, owned, and held by the said H., being, &c., (describing it,) and to dig a race, a mill-pit, and tail-race, to the creek; to erect a saw-mill and occupy the same forever; and, likewise, to cut and remove any timber that may be in the way of digging, building, and occupying said mill; the said L. K. not committing any unnecessary waste of timber on said land belonging to said H. and said K. to commence and finish said mill as soon as practicable; and the said M. H. doth hereby bind himself, his heirs, &c., to ratify and confirm to the said L. K., his heirs, and assigns forever, the aforesaid privilege to enter on said land, to dig, build, and occupy as aforesaid forever, and to hold the same for his own proper use and behoof, free from rents or any other claim forever." Here followed cer-

CO-PARCENERS.

The possession of one co-parcener, *eo nomi-*

ne, as co-parcener, is the possession of the others.—*Manchester et al. v. Doddridge*, 360

CORONER.

The coroner may, where a *post mortem* examination is necessary, employ a physician to make the examination and the county will be liable for the expense.—*Gaston v. The Board of Commissioners of Marion County*, 497

CORPORATION.

See PLEADING, 20.

1. The corporate authorities of a city are not liable for an injury to private property caused by the erection, on a public street or road within the limits of the city, over a small stream, of a culvert and embankment which have proved insufficient to resist an extraordinary flood, if the culvert and embankment had proved sufficient for all purposes for about three years, and ordinarily careful and thoughtful men, and engineers of usual skill, would not have contemplated that such extraordinary flood would ever occur.—*The City of Madison v. Ross*, 236
2. The degree of care and foresight which it is necessary to use in cases of this description, is that which a discreet and cautious man would or ought to use, if the risk and loss were to be exclusively his own; and it should be in proportion to the nature and magnitude of the injury likely to follow from its omission. *Ibid.*
3. A county agent is not a *quasi* corporation.—*Upton v. Starr*, 508
4. To constitute a corporation under the general plank-road law of 1849, there must be—1. Articles of association setting forth the name of the corporation, the route and termini of the road, and the amount and number of shares of capital stock; and 2. An actual subscription of 1,500 dollars of stock per mile to said articles, subscribed with the names and places of residence of those who make the subscription; and 3. A filing of copies of said articles in the office of the recorder of each county into which the road extends.—*The Covington, Coal-Creek, and Jacksonville Plank-Road Company v. Moore*, 510
5. A valid corporation may exist and a binding subscription of stock be made, under said law, before the appointment of directors; but the subscriptions cannot be collected till directors have been appointed—at least, except as to an amount to be paid at the time of subscribing to defray

preliminary expenses, according to the articles or by-laws of the association.

Ibid.

6. The directors may properly be elected before the articles of association are filed in the recorder's office. *Ibid.*
7. *Seem*, that if the directors were illegally elected, that could not be set up in resistance to the payment of stock-subscriptions, but would be a case for a *quo warrant* to oust the directors. *Ibid.*

COSTS.

1. Suits upon the official bonds of public officers are within the provisions of ss. 5 and 10 of c. 47 of the R. S. 1843.—*The State ex rel. Crandall v. Mann et al.*, 350
2. Debt upon the official bond of a justice of the peace. Damages assessed at 14 dollars and judgment for the plaintiff accordingly, and against the relator for costs. There appearing to have been no reduction by way of set-off, *held*, that the judgment against the relator for costs was right. *Ibid.*
3. Where the plaintiff sues in debt, assumpsit, or covenant, in the Circuit Court, for more than 50 dollars, and proves on the trial a right, *prima facie*, to recover more than 50 dollars, but owing to the defendant's evidence of matters of set-off or of other matters of reduction, the judgment for the plaintiff is only for 50 dollars or for less, the plaintiff, under the R. S. 1843, is entitled to costs.—*Higman v. Brown*, 430

COUNTY AGENT.

1. A county agent is not a *quasi* corporation.—*Upton v. Starr*, 508
2. A note was executed to G., agent of Wells county, or his successor in office. *Held*, that G.'s successor could not sue, in his own name, upon the note. *Ibid.*

COUNTY TREASURER.

See EXTORTION.

COVENANT.

See CONVEYANCE, 2. LEASE, 1, 3. VENDOR AND PURCHASER, 20.

1. Trespass for an assault and battery. Plea, that the trespasses were of and concerning the children of the plaintiff, and that after the committing of the trespasses, and before the commencement of the suit, the plaintiff released all causes of action against the defendants by reason of the trespasses, &c.—setting out the instrument of release. The instrument,

which related to the children, contained a covenant in which the plaintiff bound herself "to stop all proceedings in law now and hereafter against" the defendants and to let one of the defendants, named therein, have the children whenever he called for them. *Held*, upon demurrer to the plea, that the covenant amounted to a covenant never to sue the defendants for the trespasses complained of.—*Harvey v. Harvey et al.*, 473

2. A covenant never to sue amounts to a release, and is a bar to a subsequent suit. *Ibid.*

CROSS ACTION.

See CONTRACT, 8.

D.

DAMAGES.

See BILLS OF EXCHANGE, 1. *CONTRACT*, 1, 2, 3, 4, 6, 8, 9, 13, 14, 15, 16, 21. *REFLEVIN*, 1. *VENDOR AND PURCHASER*, 20.

1. The measure of damages for the violation of a simple contract, where vindictive damages are not authorized, is the amount necessary to have put the party injured in as good a condition when the contract was broken as if he had not made the contract.—*Jones, Administrator, v. Van Patten*, 107
2. Assumpsit by A. against B. for a breach of contract by the latter, who had agreed to lease to A. a house and small farm, and afterward refused to let him enter upon or have the premises. At the trial, the defendant asked the Court to instruct the jury, that the rule of damages in the case was the difference between the rent which A. was to pay and the market value of the rent of the premises at the time they were to be delivered to A., and that if the rent to be paid by A. was the highest in the neighborhood, and no greater rent could be had for the premises by A., he was only entitled to nominal damages. The Court refused to give the instruction, but gave the following: "Remote or special damages, such as expenses for removing to a more remote farm, are not to be allowed; but for all such as legitimately and directly arise from the breach, you are to give the plaintiff the equivalent of performance, in money. If the defendant is delinquent or in fault by breaking his contract, he is bound to repair the loss of the plaintiff thereby." *Held*, that the instruction asked by the defendant was correctly refused. *Held*, also, that the in-

struction given was, so far as it went, substantially correct.—*Williams v. Oliphant*, 271

3. The rule as to the measure of damages upon the breach of a contract for the sale of goods, is not applicable to a case like the present. *Ibid.*

DEATH.

See PRACTICE, 7, 8.

DEBT.

See PROMISSORY NOTES, 15, 16.

DEED.

See CONVEYANCE.

DELIVERY BOND.

1. A person who has executed to a constable a bond for the delivery of property levied upon execution, will be estopped, in trespass against the officer for the seizure of the property, from denying that the judgment and execution were against himself, if the bond was procured without fraud.—*May v. Johnson et al.*, 449
2. Such a bond will not be held to have been fraudulently procured, from the fact of previous misrepresentations by the constable of the obligor's liability thereon, and its not being read or explained to him, it not appearing that the obligor was an illiterate person or that he had not the means in his power of knowing the truth. *Ibid.*

DEMAND.

See CAUSE OF ACTION. CLAIM AGAINST A DECEDENT'S ESTATE, 2. *LEASE*, 1. *REWARD*, 1. *VENDOR AND PURCHASER*, 15.

DEMURRER.

See PRACTICE, 52, 53, 54.

DEPOSITION.

See PRACTICE, 41, 60.

DESCENT.

1. Application by the widow of one S., an intestate, against the *White Water Valley Canal Company*, for the assessment of damages occasioned by the construction of their canal through a lot claimed by her. It was proved, on the hearing, that the intestate, at his decease, was the owner of the property; that he was born and raised in *New Jersey*; that he and the plaintiff were married, and lived on the property sixteen years, until 1838, when

he died, leaving her in possession of the premises, where she remained until the trial in 1845; and that the intestate had no children, as far as was known. A witness also testified that he had known, and lived in the same town with, the intestate, for the last sixteen years before his death, and knew of no relatives or heirs of the intestate, except the plaintiff. *Held*, that the evidence showed, *prima facie*, that the plaintiff was the sole heir of the intestate, under the R. S. 1843.—*Sofield v. The White Water Valley Canal Company*, 179

2. To cut off the heir at law by a will, the estate must be devised expressly, or by implication, to some other person.—*Doe d. Clendenning et al. v. Lanius et al.*, 441
3. The course of the descent of an estate to the heirs at law can only be interrupted by a devise to some other person, whatever may have been the intention of the ancestor.—*McIntire et al. v. Cross et al.*, 444

DEVISE.

See CONDITION SUBSEQUENT. WILL.

DILIGENCE.

See PROMISSORY NOTE, 9, 10, 12, 28, 29.

DISSEIZIN.

See LIMITATIONS, STATUTE OF, 2.

DIVORCE.

See ALIMONY.

1. Sections 98 and 99 of chapter 46 of the R. S. 1843, in relation to opening decrees, do not apply to suits for a divorce.—*McJunkin v. McJunkin*, 30
2. Bill by husband against wife for a divorce, on the ground of abandonment by the wife. It was proved, at the hearing, that a separation had taken place, and the wife had afterward said she did not intend to live again with the husband; but it did not appear which party had abandoned the other. *Held*, that the bill was properly dismissed.—*McCoy v. McCoy*, 555

DOWER.

See ACKNOWLEDGMENT. PLEADING, 22, 23.

1. Upon the hearing of a petition for the assignment of dower, the right of the petitioner to dower was established, and the Court having appointed commissioners to make an assignment thereof, instructed them to assign the same accord-

ing to the value of the land at the time of the assignment, exclusive of the improvements made after the husband's alienation. *Held*, that the defendant, being the grantee of the husband, could not complain of the instruction.—*Throp v. Johnson et ux.*, 343

2. An instruction to commissioners appointed to assign dower, to assign the same by metes and bounds, will be presumed to be right where the record does not contain the evidence. *Ibid.*
3. The statute of 1824 enacts that a married woman may, by joining in a deed with her husband, release or convey her dower.—*Davis et al. v. Bartholomew*, 485
4. A deed executed while the statute of 1824 was in force, contained the following, which were the only words affecting the dower of the wife, to-wit: "In witness whereof the said J. B. and R., his wife, who hereby relinquishes her right of dower in the above premises, have hereunto set their hands, the date above written." *Held*, that under the said statute, the words quoted amount to a release of dower. *Ibid.*
5. The joining by a married woman with her husband in the covenants contained in a deed of land, does not convey or release her dower. *Ibid.*
6. The signature and seal of a married woman to a deed executed by her husband, are not sufficient of themselves to release her dower. *Ibid.*
7. To bar dower, the deed itself must contain the words necessary to constitute a conveyance or release, and it cannot be aided by the certificate of acknowledgment. *Ibid.*
8. Dower lies against a tenant in common before partition. *Ibid.*

E.

EASEMENT.

See FERRIES.

EJECTMENT.

See AMENDMENT, 3, 4.

1. In ejectment, the defendant cannot prove that a deed professing to convey a specific number of acres, was intended to convey more.—*Doe d. Searight et al. v. Swails*, 329
2. A party whose land has been sold at sheriff's sale upon an execution against him, cannot, in ejectment to recover possession of the premises, show that his own title was defective, to prevent a recovery; but

third persons in possession may.—*Harris et al. v. Doe d. Spencer*, 494

EMINENT DOMAIN.

See LEGISLATURE.

EQUALIZATION, STATE BOARD OF.

See STATE BOARD OF EQUALIZATION.

ERROR.

See PRACTICE, 40, 51, 58, 60, 61.

1. The admission of illegal evidence, or the giving of erroneous instructions to the jury, cannot be assigned for error, unless such evidence or instructions are shown by a bill of exceptions.—*Vickers v. Cannon*, 29
2. It is not error for the Court to refuse to give an irrelevant instruction to the jury.—*Philips v. Doe d. Tucker*, 132
3. When the general issue and special pleas are filed in the action, and the defense set up in the special pleas is admissible under the general issue, it will not be examined on error whether demurrers to the special pleas were properly sustained or not.—*Cheek et al. v. Glass*, 286

ERROR, WRIT OF.

See WRIT OF ERROR.

ESTATE OF A DECEDENT, CLAIM AGAINST.

See CLAIM AGAINST A DECEDENT'S ESTATE.

ESTOPPEL.

See DELIVERY BOND, 1.

EVIDENCE.

See APPEAL, 3. DESCENT, 1. EJECTMENT, 1. FORGERY. HIGHWAY, 2. MARRIAGE, PROMISE OF, 1. PRACTICE, 58. PROMISSORY NOTES, 12, 13, 21. TRESPASS, 2. WITNESS, 1, 3, 4.

1. In an action against the *White Water Valley Canal Company* upon an award of damages for injury done by the latter to the plaintiff by entering upon his land and taking materials for the construction of the canal, the defendant offered to prove, as an offset to the damages claimed by the plaintiff, that, at the time of committing the injuries complained of, the premises were the real estate of one J., who was the owner of a large tract of land of which said premises were a part, and that the arbitrators, in determining upon their award, refused to take into account the benefits and advantages to the whole of said tract, while owned by

J., resulting from the construction of the canal. *Held*, that the Circuit Court properly rejected the evidence.—*The White Water Valley Canal Company v. Henderson*, 3

2. The admission of illegal evidence, or the giving of erroneous instructions to the jury, cannot be assigned for error, unless such evidence or instructions are shown by a bill of exceptions.—*Holliday v. Coe*, 26
3. Before the rendition of judgment upon the verdict for the plaintiff in slander, the defendant moved for a new trial. The Court took the motion under advisement, and continued the cause until the next term. The record of such next term showed that the defendant then came and suggested the death of the plaintiff, since the preceding term of the Court; and that the attorneys of record of the plaintiff also came, and agreed to remit a specified part of the verdict, in consideration of which the defendant agreed that the Court, without a decision of the motion, should render judgment for the residue of the verdict; which the Court thereupon did. *Held*, that the record did not establish that the plaintiff was dead when the judgment was rendered.—*Rundles et al. v. Jones*, 35
4. The facts that errors of law were assigned in the Supreme Court by the executors of the plaintiff below, and that they were pleaded to by the defendant, furnish no evidence that the plaintiff below was dead when the judgment was rendered in the Circuit Court. *Ibid*.
5. In debt upon the official bond of K., a school commissioner, and his sureties, for the wasting and converting by K., to his own use, during his term of office, of certain large sums of money derived from the sale of school lands, &c., the defendants produced the record of the board of commissioners, and a report of K., showing a statement of his accounts with the several townships, which had been filed and recorded, and offered the same in evidence. *Held*, that the evidence was properly rejected.—*Kintner et al. v. The State ex rel. Skelton*, 86
6. Exceptions to the admissibility of evidence will not be regarded by the Supreme Court, in a civil action, unless they appear, by the record, to have been taken before the jury retired to deliberate upon their verdict.—*Jones, Administrator, v. Van Patten*, 107
7. In an action of slander, the defendant cannot prove, under the general issue, the truth of the words laid in the declaration

- in order to rebut the inference of malice.—*Abshire v. Cline*, 115
8. To support an indictment against a defendant for knowingly suffering his horse to be run in what is commonly called a horse-race, along a public highway, it is not necessary to prove that a bet or wager was made, or a distance to be run agreed upon, or that judges were appointed to decide upon the result of the race.—*Watson v. The State*, 123
9. Upon the trial of such an indictment, evidence that the race was run along a road leading from one specified town to another in the county, &c., is sufficient, *prima facie*, to sustain the averment that the road in question was a public highway. *Ibid.*
10. Evidence is admissible to prove the consideration of a general receipt upon a judgment.—*Lewis v. Mallock et al.* 120
11. To an action brought upon a judgment rendered in another state, the defendant may show, by evidence *dehors* the record, that he was not within the jurisdiction of the Court at any time between the commencement of the action and the recovery of the judgment; and that an attorney who undertook to appear for him, had no authority so to do.—*Boylan v. Whitney et al.*, 140
12. The Court has no right to exclude such evidence because the deposition containing it contains also evidence tending to prove that the judgment was rendered upon a partnership-debt, and that the defendant's partner employed the attorney on behalf of, and that the judgment was rendered against, the firm. *Ibid.*
13. Assumpsit against executors upon the common counts for money had and received by the testator. Pleas—1. The general issue; 2. That the causes of action did not accrue within five years before the R. S. 1843 came into force; 3. That the causes of action did not accrue within six years; 4. That the causes of action did not, nor did either of them, accrue within six months before the commencement of the suit; and if the term of six years expired after the time of the decease of the testator, the suit was not brought within eighteen months after his decease. Replication to the last three pleas—that the testator, during his whole life, concealed from the plaintiff the cause of action; and issue on the replication. The suit was commenced in 1849. The plaintiff offered to prove, on the trial, by a competent witness, that in 1842 the testator admitted to him the existence of a part of the cause of action; but the Court refused to hear the testimony. *Held*, that the testimony was admissible.—*Wilcox v. Duncan et al., Executors*, 146
14. In replevin by A. against B. for a quantity of flour, A. first read in evidence a written contract entered into with him by C., whereby C. agreed to manufacture, within a time limited, at his, C.'s mills, for A., 2,000 barrels of superfine flour, A. to furnish the wheat, &c. He also proved that, soon after the execution of the contract, he delivered large quantities of wheat to C. pursuant thereto; that the flour in controversy was manufactured by C. out of said wheat, and shipped by him to B.'s warehouse; that B. gave C. warehouse receipts for the flour; and that C. transferred those receipts to one D. A. then offered to prove the declarations of C. that when he, C., received said wheat, he said it was A.'s wheat; and when he shipped said flour to B., he said it was A.'s flour. The evidence of these declarations was objected to, as being hearsay testimony, but the objection was overruled. *Held*, that the objection should have been sustained.—*Ashby v. West*, 170
15. A. having proved the contract and facts mentioned and a demand of the flour of B. as his property, and, also, an offer to pay B. his charges on the same, and his refusal to deliver it; and the Court having admitted proof of the declarations of B. as above mentioned; and A. having given in evidence said warehouse receipts and their assignment to D. to secure a loan; A. then offered to read the deposition of B., which was in relation to facts directly concerning the property in the flour, but the Court rejected the deposition. *Held*, that the rejection was wrong. *Ibid.*
16. The contract between A. and C. was one of bailment and not of sale. *Ibid.*
17. Parol evidence is not admissible to prove a contemporaneous understanding and agreement contrary to the terms of a deed between the parties.—*Trullinger v. Webb*, 198
18. A. purchased of B., in 1838, a tract of land, paid a part of the purchase-money in hand, and was to pay the residue by discharging an outstanding note of B. to a third person, when A. should sell the land. A. sold the land, omitted to pay the note, and concealed from B., who had removed to another state, the fact of the non-payment, and suppressed information thereof. Judgment having been recovered against B. upon the note, he brought this suit, in 1849, against A.'s executor, upon the following common counts: 1. For money had and received by the testator, &c.; 2. For land bargained and sold to

- the testator, &c.; 3. For interest for the forbearance of moneys loaned to the testator, &c.; and 4. Upon an account stated. The facts above recited were the substance of the evidence. *Held*, that there was no proof of any of the causes of action alleged in the declaration. *Held*, also, that the non-payment of the note could not properly be proved under any of the counts.—*Williams, Executor, v. Williams*, 222
19. The answer put in to a bill requiring an answer without oath cannot operate as evidence for the defendant. *Lark v. Brown*, 234
20. Proceeding in domestic attachment. Plea, that when the suit was commenced, and for 18 months previously, and from thence hitherto, the defendant was an inhabitant and resident of the territory of Wisconsin, &c. To support the plea, it having first been proved that the defendant had left Allen county, in this state, some two years previously to the commencement of the suit, evidence was received of the declarations of the defendant when he left, that he was going to some of the western territories, and of his intention as to returning. *Held*, that the evidence was admissible as a part of the *res gestæ*.—*Burgess v. Clark*, 250
21. Post-marks on letters are admissible in evidence, in a civil case, without proof, where no reason is shown for doubting their genuineness. *Ibid.*
22. Action upon a replevin-bond by the plaintiff, the administrator of the assignee, for the failure of the principal in the suit in replevin to prosecute his suit with effect. Interlocutory judgment for want of a plea, and the assessment of damages submitted to a jury. The suit in replevin had been brought for certain pork, hams, and lard, and was dismissed for the insufficiency of the affidavit. The defendants having adduced evidence to prove that the property replevied was the product of hogs sold by A., the principal in the bond, and one B., to C., the plaintiff's intestate, and that the latter had agreed that A. and B. should retain a lien on the property, and the vessels containing it, for a balance due for the hogs, and that the same should be kept separate from other property of like kind for that purpose, and that it was set apart for the avowed purpose of vesting the possession in A. and B.; and having also adduced evidence to prove that the intestate had given A. and B. authority to sell the property to secure the balance of the purchase-money due, upon giving certain notice, and that, after giving the notice, A. and B. sold the property at public sale, pursuant to the agreement, and bought the same for a sum less than the balance of the purchase-money due; they then offered in evidence, in mitigation of the damages, the record of a suit in assumpsit by A. and B. against the intestate for the price of the hogs, in which the intestate had pleaded the general issue, and also a special plea, which recognized the validity of said public sale, and set up that A. and B. had received therefrom a certain sum, being more than the balance due on the price of the hogs, to which the plaintiff had replied, traversing the plea as to the amount alleged to have been received, and averring it to have been a specific sum, less than the balance due on the price of the hogs, in which case there was a general verdict for A. and B., and judgment accordingly. *Held*, that said record was correctly admitted in evidence.—*Huff, Administrator, v. Earl*, 306
23. The language of an agreement was as follows: I have this day sold my lot to A. B. on the plat in the town of South Bend—on the plat of said town on the river-bank. I have received value and will make the deed as soon as convenient. August 11, 1835. (Signed) C. D. *Held*, that parol evidence was admissible to identify the particular lot intended to be conveyed, and that the contract was, therefore, sufficiently certain to be the foundation of a bill for specific performance.—*Colerick et al. v. Hooper*, 316
24. While the statute was in force requiring that where evidence was objected to, the grounds of the objections should be stated, objections were made without assigning the reasons. *Held*, that they were correctly overruled.—*Jones et al. v. Ransom*, 327
25. In a suit by the payee against the makers of a note, the latter will not be allowed to show, by parol evidence, that a guaranty indorsed upon the note was, at the time it was made, accepted by the payee in full satisfaction of the note.—*Smith et al. v. Stevens*, 332
26. Where parol evidence is admitted at the trial, without objection, the question of its admissibility cannot be raised on error.—*Harbert v. Dumont et al.*, 346
27. In an action of assumpsit by an administrator for a quantity of charcoal delivered and money lent by the intestate to the defendant, the plaintiff proved the first item clearly, and, in order to prove the latter, introduced a witness who testified that he heard the defendant tell the intestate, at, &c., that if the latter would advance the money and purchase iron for a wagon, he would put the iron on the

- wagon, sell the wagon, and pay the intestate what he owed him; and that the intestate purchased and paid for the iron and delivered it to the defendant. The witness was the holder of a claim against the intestate's estate, but it did not appear that the estate was insolvent. The jury found for the plaintiff the said items of indebtedness, with interest till the giving of the verdict. *Held*, that the jury were authorized to infer that the intestate bought iron enough to iron the wagon. *Held*, also, that the jury were authorized to allow interest on both items to the time of giving their verdict. *Held*, also, that the witness was competent.—*Martin v. Barlow, Administrator*, 367
28. It is not material on error whether a deposition read by the plaintiff at the trial should have been suppressed or not, if the evidence was amply sufficient without it to sustain the suit.—*Billingsley v. The State Bank*, 375
29. Where the evidence given at the trial is not in the record, it will be presumed that the judgment was in accordance with it.—*Houck v. Deits*, 385
30. Debt by the assignee of promissory notes against the maker. Plea, that after the assignment, he had paid the notes to the payee, with the assent of the plaintiff, in goods, &c. Issue on the plea. *Held*, that general evidence of the delivery of goods, &c., by the defendant to the payee after the assignment, was admissible to go to the jury.—*O'Neal v. Wade*, 410
31. Where the evidence is not contained in the record, the Court will presume that the facts proved were such as to authorize the judgment.—*Higman v. Brown*, 430
32. Where a promissory note, whether negotiable by the law-merchant or not, has been assigned after it became due, the admissions of the assignor made before the assignment that the note had been paid, are admissible in evidence against the assignee.—*Blount v. Riley*, 471
33. An objection to evidence given in a cause tried before the passage of the act of 1851 on the subject, will be held to have been properly overruled, if the ground of the objection does not appear in the record.—*Heuler v. Degant*, 501
34. If a plea of license answers the gravamen of the declaration, proof of the license will defeat the suit.—*Conklin v. The White Water Valley Canal Company*, 506
35. The rule that objections to evidence should be shown by the bill of exceptions, refers to cases in which the testimony has been admitted, and not to those in which it has been rejected.—*Gore v. Gore et al.*, 522
36. To sustain a set-off for money paid as a replevin-bail, proof must be made of the entry of replevin-bail.—*Walker, Executor, v. Clymer*, 525
37. Confessions made by a prisoner after he has been professionally advised of their effect, are admissible in evidence against him.—*Hamilton v. The State*, 552
- ### EXCEPTIONS.
- See PRACTICE, 13, 14.
- ### EXECUTION.
- See AMENDMENT, 3, 4. REPLEVIN-BAIL, 2, 3, 4, 5. VENDOR AND PURCHASER, 10, 11.
- ### EXECUTORS AND ADMINISTRATORS.
- See ADMINISTRATOR'S SALE. CLAIM AGAINST A DECEDENT'S ESTATE. GUARDIAN AND WARD, 7. WILLS, 3, 4.
1. If an administrator undertakes, in writing, to pay a debt of the intestate when assets shall come to his hands, he may be sued on the undertaking, after the receipt of such assets, in his individual capacity, and the judgment against him will be *de bonis propriis*.—*Carter v. Thomas*, 213
 2. The administrator of the legal holder of a note, has the right to assign it.—*Thomas v. Reister, Administrator*, 369
- ### EXTORTION.
- A county treasurer who exacts and receives from a tax-payer a fee as for a distress and sale of his goods for taxes, when none have actually been made, is guilty of extortion.—*The State v. Burton*, 93
- ### F.
- ### FELONY.
- See COMMON PLEAS.
- ### FERRIES.
1. The right to establish public ferries resides in the legislature; and the extent of the ferry-right conferred depends upon the terms of the legislative grant.—*Bush v. The Peru Bridge Company*, 21
 2. A simple grant of a right to establish a public ferry will not be construed to be exclusive, but subject to such future grants as the public convenience may require. *Ibid.*

3. The R. S. 1838 do not confer upon the first grantee of a ferry-privilege, the exclusive right to maintain a ferry at the point where the same may be established, but reserve the right to establish bridges or other ferries at the same point, when the public convenience shall require them.

Ibid.

4. The circumstance that the boards of commissioners of the several counties have authority, by law, to establish ferries, does not affect the right of the legislature to exercise that power.

Ibid.

5. An irregularity in the proceeding of the defendants in executing the writ of *ad quod damnum* authorized by their charter could only be taken advantage of by the owners of the soil appropriated by the defendants.

Ibid.

FORECLOSURE.

See CHANCERY, 15, 17, 18.

FOREIGN JUDGMENT.

See JUDGMENT, 2.

FORFEITURE.

See LEASE, 1, 2, 3.

FORGERY.

1. Upon the trial of a prisoner on an indictment for forgery in passing a counterfeit bank-bill, the Court allowed a witness to state, in answer to a question of the prosecuting attorney, the names of persons who were competent judges of the genuineness of bank-bills. *Held*, that there was no error in this.—*McCartney v. The State*, 353
2. Upon the trial of such an indictment the state may prove, in order to show the defendant's criminal intent, that about the time the bill was passed, he uttered other counterfeit bills on the same bank and on other banks; and the fact that indictments against the defendant are pending, or have been tried, for the passing of such other notes, will not affect the admissibility of the evidence. *Ibid.*
3. The state may also prove what the defendant said at the time of passing the bill described in the indictment, in regard to it. *Ibid.*
4. At the trial upon such an indictment, the Court instructed the jury that if they were satisfied that the defendant uttered in payment and put away the note described in the indictment; that it was forged and false, and that the defendant knew it to be so, and put it upon the person named in the indictment, with intent to defraud

him; no other proof of the existence of the bank upon which it purported to be, was necessary. *Held*, that the instruction was correct. *Ibid.*

FORMER RECOVERY.

Debt on the official bond of a justice of the peace. Breach, the non-payment of money collected by the justice to the party entitled. Plea, a former recovery. It appeared, on the trial, that in the former suit pleaded, which was on the same bond and between the same parties, the plaintiff obtained judgment for several sums of money which had been collected by the justice and not paid over; but that two of the sums collected by the justice and not paid over by him, had been omitted, by mistake, in taking the former judgment. This suit was brought to recover those two sums. *Held*, that the former recovery was not a bar to the present suit.—*Byrket et al. v. The State ex rel. Silvers*, 248

FRAUD.

See CHANCERY, 13, 14. DELIVERY BOND. PARTNERS, 2. PLEADING, 4. PRACTICE, 23.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

See CHANCERY, 90.

1. A conveyance of land by father to son, without a valuable consideration, and for the purpose of defrauding existing creditors, is void as against such creditors, but valid between the parties; and, where the lands have descended to the heirs of the grantee, a Court of chancery will, upon the application of such creditors, set aside the sale as to them, and order the land to be sold to pay their claims and costs; and the heirs of the grantee will be entitled to the surplus.—*Burtch et al. v. Elliott*, 99
2. If the party who has paid the consideration for land and is entitled to a deed, has the land conveyed for his use to another, the latter holds the land simply in trust for the former, and it is liable to execution, under the R. S. 1843, upon any judgment against the person for whose use it is held.—*Tewis et al. v. Doe*, 129
3. Where a judgment-debtor colludes with a third person and procures land to be conveyed to the latter to defraud judgment-creditors, the land is liable, under the R. S. 1843, to execution upon the judgment. *Ibid.*

4. A fraudulent conveyance of land made and received for the purpose of preventing its being subjected to the payment of an existing debt, but without any intention to defraud subsequent creditors, will not be set aside, in equity, upon the application of a creditor whose debt was contracted after the deed of conveyance was made and recorded.—*Lynch v. Raleigh et al.*, 273
5. Where a fraudulent conveyance of land has been made and received to avoid the payment of an existing debt, with an agreement for a reconveyance upon a repayment of the purchase-money and the expenses of improvements, a creditor of the grantor whose debt was contracted after the deed was made and recorded, if occupying the position of a junior mortgagee or creditor entitled to redeem, cannot institute proceedings for that purpose, after the death of the grantor, unless before his decease he obtained judgment against him, or an administrator has been appointed. *Ibid.*
6. A sale of land made by a vendor during the pendency of a suit against him, by collusion with the vendee, to prevent the collection of an anticipated judgment, will be set aside in equity, as against the vendee or his fraudulent assignee, upon the application of the judgment-creditor; and the fact that the vendee paid a full consideration for the land will make no difference.—*Rogers et al. v. Evans*, 574
7. To make the deed of a fraudulent grantor valid in the hands of the purchaser, as against the creditors of the grantor, it is not enough for him to show that he has paid an adequate consideration; but he must show, in addition, that he made the purchase in good faith, innocent of any knowledge of or participation in the fraudulent designs of the vendor. *Ibid.*

FREIGHT.

- A., the owner of a flat-boat, undertook with B., for a certain sum, to transport, from Covington, Indiana, to New Orleans, Louisiana, 3,771 bushels of corn to be delivered at the latter place, without delay, to C. or his assigns, in like good order as at the place of shipment, the unavoidable dangers of the river navigation or fire excepted. In pursuance of his undertaking, A. proceeded on the voyage with his boat and said cargo, until the boat, when within about 250 miles of New Orleans, sunk, and the whole cargo was lost. Held, that A. could not recover the freight, or any part of it.—*Holliday v. Coe*, 26

FUGITIVES FROM LABOR.

See CONSTITUTIONAL LAW.

G.

GAMING.

See INDICTMENT, 11, 12.

GOODS SOLD AND DELIVERED.

See CONTRACT, 7. LEASE, 5.

- A. sold to B. nine cribs of corn, at 20 cents a bushel, with a warranty that they contained 2,500 bushels, and an agreement that, if they did not, A. would supply the deficiency. The sum to be paid for the 2,500 bushels was agreed on, and time was given for the payment; and the cribs of corn were left with A., as B.'s agent, to be taken care of for B. Held, that, as between A. and B., the sale was complete. Held, also, that B. had no lien on the corn. Held, also, that, supposing there was not such a change of possession as is contemplated by s. 8, c. 33, R. S. 1843, yet even as between B. and a subsequent bona fide purchaser from A., the sale to B. was valid.—*Sloan v. Kingore et al.*, 549

GRANT.

See FERRIES, 1, 2, 3, 4.

GUARANTOR.

See WITNESS, 6.

GUARANTY.

See PROMISSORY NOTE, 14.

GUARDIAN AND WARD.

1. A guardian may invest the money of his ward in real estate, under an order of the proper Court.—*Sherry v. Sansberry*, 320
2. If he converts it into real estate, without such an order, he may be liable to answer for any loss that may follow, and the ward will have the option, when he arrives at full age, to accept the real estate, or to refuse it, convey it to his guardian and require the purchase-money and interest. If he accepts the real estate, with a full knowledge of all the facts, and without fraud on the part of the guardian, he will be bound by the acceptance. *Ibid.*
3. So the ward may, on arriving at full age, purchase property from his late guardian; and although such a purchase will be closely scrutinized by a Court of equity, yet, if fairly made, it will stand. *Ibid.*

4. A guardian contracted with his ward, two years before the latter arrived at full age, to sell to him a tract of land, for a sum agreed upon. The ward went into possession, and remained there till he attained to his majority, and, hence, knew the location, quality, and value of the land. With this knowledge, and without, so far as appeared, any undue influence on the part of the guardian, he accepted a deed for the land after he became of full age, and subsequently retained the possession and use of it for fifteen months, without objection. *Held*, that the ward could not have the sale set aside and compel the guardian to account for the purchase-money. *Ibid.*
5. A direction or order given to a guardian by a Probate Court, within the sphere of its jurisdiction, cannot be impeached collaterally, except for fraud. *Ibid.*
6. An order of the Probate Court to a guardian to invest money of his wards, without defining the amount, in the completion of an unfinished distillery, according to their interests therein, was held to justify a reasonable prudent expenditure for the purpose.—*Pardun et al. v. Dobesberger*, 389
7. The money of the wards being in the hands of their father's administrator, the latter, under the direction of the guardian, made expenditures of the money in the completion of the distillery. *Held*, that the administrator was entitled to a credit, upon settlement of the estate, so far as his expenditures were made with reasonable care and judgment. *Ibid.*

H.

HABEAS CORPUS.

1. A prisoner who has applied for a writ of *habeas corpus* to be let to bail, may, upon the refusal of the judge to allow him to give bail, prosecute a writ of error from such judgment to the Supreme Court.—*Luman v. The State*, 293
2. The judge, hearing such application, may, under the R. S. 1843, cause notice to be given to the party interested in resisting it, or his attorney, and witnesses to be summoned to testify in the premises; and may fully investigate the case. *Ibid.*
3. A prisoner indicted for murder in the first degree, may sue out a writ of *habeas corpus* to be let to bail, and, upon proof that he is guilty of a bailable homicide, he should be allowed to give bail. *Ibid.*

HEARSAY.

See EVIDENCE, 14.

VOL. III.—77

HEIR AT LAW.

See DESCENT, 1, 2, 3. *WILL*, 4.

HIGHWAY.

See REMEDY, 2.

1. The Circuit Court, upon an appeal from an order of the board of county commissioners establishing a change of a certain road in the county, set aside the report of the viewers; but no bill of exceptions was then taken, nor did it appear on what ground the report was set aside. *Held*, that it must, therefore, be presumed to have been done correctly.—*Prabody et al. v. Sweet*, 514
2. The board of commissioners, upon application and the report of viewers, made an order establishing a change of a road in the county. On appeal, the Circuit Court dismissed the suit. There was no proof that, before the application for the appointment of viewers, the public had been notified of the application, as required by the R. S. 1843, either by posting up notices thereof in three public places for at least twenty days, or by publishing the notice in a newspaper of the county. *Held*, that the want of such proof was a sufficient reason for dismissing the suit. *Ibid.*

HORSE-RACE.

1. To support an indictment against a defendant for knowingly suffering his horse to be run in what is commonly called a horse-race, along a public highway, it is not necessary to prove that a bet or wager was made, or a distance to be run agreed upon, or that judges were appointed to decide upon the result of the race.—*Watson v. The State*, 123
2. Upon the trial of such an indictment, evidence that the race was run along a road leading from one specified town to another in the county, &c., is sufficient, *prima facie*, to sustain the averment that the road in question was a public highway. *Ibid.*
3. In an indictment for suffering a horse to be run in a horse-race along a public highway, the *termini* of the highway need not be stated.—*The State v. Armstrong*, 139

HUSBAND AND WIFE.

See ACKNOWLEDGMENT. CONVEYANCE, 5. *DOWER*, 5, 6. *PLEADING*, 44. *PROMISSORY NOTES*, 30, 31.

1. If a wife, at the time of her marriage, is seized of an estate of inheritance in land,

- the husband, upon the marriage, becomes possessed of an estate therein during their joint lives, which he may convey.—*Butterfield et al. v. Brall*, 203
2. An attempt by a husband possessed of such an estate, to convey the fee of the land, will not render his deed ineffectual to convey his actual estate. *Ibid.*
 3. A husband who comes into possession of moneys held by his wife in trust, whether as her administrator, or otherwise, is held as a trustee, and may be compelled, in chancery, to account for it.—*Krister v. Howe et ux.*, 268
 4. Where the subject-matter of a bill against husband and wife relates to the inheritance of the wife, a decree against both upon the answer of the husband on behalf of himself and the wife confessing the bill, is erroneous.—*Work et al. v. Doyle et al.*, 436
 5. It is error to render a decree by default, in such a case, against a married woman. *Ibid.*

I.

IMMATERIAL ISSUE.

See PRACTICE, 68.

In assumpsit against the judgment-plaintiff to recover an excess of interest received by him on the judgment over the legal rate, he pleaded to the declaration that he did not take and receive the same, nor did he promise, &c., within one year previous to the commencement of the suit. Upon this plea, the plaintiff took issue. *Held*, that the action not having been brought under the provisions of the statute, to recover the whole of the interest paid as illegal, the issue raised was an immaterial one.—*Berry v. Makepeace*, 154

INADEQUACY OF PRICE.

See SALE, 1.

INDICTMENT.

See HOBBS-RACE, 1, 2, 3.

1. An indictment for murder in the first degree, was found in the *Deeatur* Circuit Court, at the April term, 1851, and concluded *contra formam statuti*. By the statute of 1843, the punishment of that crime was death. By the act of 1846, the punishment is either death or imprisonment in the state prison at hard labor during life, at the discretion of the jury. *Held*, that the conclusion of the indictment in the singular, to-wit, *contra formam statuti*, was correct.—*Bennett v. The State*, 167
2. Indictment against C. for keeping a public nuisance. The offense was charged as follows: That said C., late, &c., on, &c., at, &c., in and upon a public street within the limits of the town of R., in said county, did then and there unlawfully, on said street, erect, continue, and maintain, on other days and times thenceforward, for the space of three months then next following, by then and there, in the public street aforesaid, in the limits of the town aforesaid, in the county aforesaid, on the days and times aforesaid, in the public view of the inhabitants of said town and other citizens of the state of Indiana who were wont and accustomed to pass and repass on, in, and through said street, erecting, keeping, and letting to mares a certain stallion which he, the said C., did then and there unlawfully keep and let to mares, &c. *Held*, that the indictment sufficiently showed that C. had not provided an inclosure in which his stallion was let to mares; and, though negligently drawn, substantially described the offense.—*Crane v. The State*, 193
3. An indictment for retailing spirituous liquor, charged that the liquor was sold to a person whose name was unknown to the grand jurors. One witness only was examined at the trial, and he testified to whom the liquor was sold, that he was a witness before the grand jury when the indictment was found, and that he then knew the name of the person to whom the liquor was sold, and would have disclosed the name to the grand jury if they had inquired what it was. *Held*, that as the grand jury, upon proper inquiry of the witness, could have ascertained the name, the indictment could not be sustained.—*Blodget v. The State*, 403
4. Section 121 of the general road law of 1849, which provides a remedy by action of debt at the suit of the supervisor for the obstructing of a public highway, does not take away the remedy by indictment authorized by s. 65, c. 53, R. S. 1843, for the same offense, but furnishes a cumulative remedy.—*The State v. Vint*, 447
5. The charge in an indictment was as follows: That the defendant, on, &c., at, &c., unlawfully sold to one J. W. a quantity of *spiritual* liquors by retail, less than a quart, to-wit, one half-pint of *spirituous* liquor, for five cents in money, he, the defendant, not being licensed to vend *spiritual* liquors by retail; contrary, &c. *Held*, that the indictment was not bad for using the word *spiritual* instead of *spirituous*.—*The State v. Clark*, 451
6. An indictment charged that A. B., on, &c., at, &c., with force and arms broke

- and entered in and upon the close and land of *C. D.*, there situate, (describing it,) and then and there took and removed from said land a portion of the timber of a poplar tree, which timber, so removed by said *B.*, was of the value, &c., without license, &c. *Held*, that the indictment was not defective for not alleging that said portion of said tree was "then and there" of the value stated.—*The State v. Blackwell*, 529
7. An indictment for keeping a gaming-house was *held* not to be bad for charging that the defendant kept a house instead of his house to be used for gaming, the latter term being employed by the statute defining the offense.—*The State v. Hubbard*, 530
8. Indictment for gaming, containing two counts; the first for money won, and the second for money lost, at a bet upon the result of a game of cards played by the defendant and others. The indictment did not state whether the bet was made with the persons played with, or with a third person. *Held*, that the indictment was bad.—*The State v. Stallings*, 531
9. A count in an indictment on the statute relative to lotteries was substantially as follows: That the defendant, on, &c., at, &c., unlawfully made a certain lottery for a division of property to be determined by chance, the making of which not being authorized by law, contrary to the statute. *Held*, that the indictment was bad, after judgment, for not stating the species of property.—*Markle v. The State*, 535
10. It is a general rule that whatever is essential to the gravamen of the indictment must be set out particularly. *Ibid.*
11. An indictment, under the R. S. 1843, was as follows: The grand jurors impaneled, &c., upon their oath, present that *A. B.*, on, &c., at the county, &c., aforesaid, and continuously from that day until the day of the finding of this bill of indictment, had and possessed a house, a room, a shed, and a tenement, situate in said county, and that said *B.* there, during all the time aforesaid, did keep and suffer his said house, room, shed, and tenement, to be used and occupied for gaming, contrary, &c. *Held*, that the indictment was good. *Held*, also, that to sustain the indictment, it was sufficient to prove that the defendant kept either of the places specified, for any length of time, to be used, &c., for gaming.—*McAlpin v. The State*, 567
12. To sustain the indictment, it is not essential to prove that the gaming actually took place at the house, but the commission of the offense may be inferred from circumstances. *Ibid.*
13. Indictment, under the R. S. 1843, against *A. B.*, containing two counts. The second, after the usual introduction, charged that the said *A. B.*, on, &c., at and in the county aforesaid, [the county of *P.*,] did then and there knowingly keep and suffer his house in which he kept his grocery to be used and occupied for the purpose of gaming at and with cards, for money and other valuable articles; contrary, &c. *Held*, that the indictment was sufficient.—*The State v. Staker*, 570
14. It is error to quash an indictment containing a good count. *Ibid.*
15. An indictment for retailing spirituous liquor, charged the sale to have been made by *A.* and *B.* to *C.* The evidence showed that *A.* and *B.* had each sold spirituous liquor by retail to *C.*, at different times, at the same bar and in the same house, but no joint sale was shown, nor that either participated in the act of the other. *Held*, that the indictment was not sustained.—*Farrell et al. v. The State*, 573

INDORSER.

See BILLS OF EXCHANGE, 3, 5, 8, 9. PROMISSORY NOTES, 5, 7, 8, 9, 10, 11, 12, 24, 30, 31.

INFANT.

See PRACTICE, 32, 33.

INFORMATION.

See COMMON PLEAS, 2.

A., a minor, contracted with *B.* to work six months for *B.* at 10 dollars a month; and if he failed to work out the time he was to receive no pay. Having worked for *B.* about three months, he left *B.* without assigning any reason therefor, and being yet a minor, sued *B.* for his labor during said period at 13 dollars a month. *Held*, that the contract was a voidable one. *Held*, also, that *A.* having avoided it by leaving *B.*'s service and commencing the suit, the suit was sustainable.—*Dallas v. Hollingsworth*, 537

INJUNCTION.

1. An order of injunction granted by a circuit judge, in the vacation of the Court, is an interlocutory order of the Circuit Court, within the meaning of section 70, of chapter 37, of the R. S. 1843.—*The Michigan Central Railroad Company et al. v. The Northern Indiana Railroad Company et al.*, 239

2. From such an order an appeal lies, by virtue of said section, to the Supreme Court. *Ibid.*
3. The appeal is required by the statute to be taken at the time when the order of injunction is granted. *Ibid.*
4. The period of two days after the order of injunction was granted, was held, under the circumstances of the present case, to be at the time of granting the order, within the meaning of the statute. *Ibid.*
5. The granting of an appeal in the vacation of the Circuit Court, without notice to the adverse party, from an order of injunction granted by the judge of the Circuit Court in vacation, does not deprive the appellee from being heard upon the sufficiency of the injunction-bond, or whether the appeal was granted in due time; but the want of a sufficient bond, or the fact that the appeal was not taken in due time, may be shown on a motion to dismiss the appeal. *Ibid.*
6. The act of 1847, "to amend the provisions of the 37th chapter of the Revised Code," does not affect the right of the party aggrieved to appeal, at the time of making the order, from a judge's order of injunction granted in vacation. *Ibid.*
7. An injunction should not be granted, under the R. S. 1843, till the adverse party has had ten days' notice of the time and place of hearing the application therefor, unless the bill shows an urgent necessity that the injunction should be granted before notice can be given, and that an emergency exists which the complainant could not, by reasonable diligence, have prevented. — *The Indiana Central Railway Company v. The State of Indiana et al.*, 421
8. The fact that the *Indiana Central Railway* has been located on some part of the tract of 80 acres of land purchased for the use of the institution for educating the deaf and dumb, does not, alone, authorize the conclusion that the uses and purposes for which the institution was located on such tract would be so materially interfered with as to justify the enjoining of the company from crossing it.

INSOLVENCY.

See PROMISSORY NOTES, 12.

INSTALMENT.

See CHANCERY, 10. VENDOR AND PURCHASER, 5.

INSTITUTION OF THE STATE FOR EDUCATING THE DEAF AND DUMB.

See INJUNCTION, 8.

INSTRUCTIONS TO THE JURY.

See DOWER, 2. PRACTICE, 49, 71.

1. Exceptions to the instructions of the Court to the jury, will not be noticed in the Supreme Court, unless they appear, by the record, to have been taken before the jury delivered their verdict. — *Jones, Administrator, v. Van Patten*, 107
2. It is not error for the Court to refuse to give an irrelevant instruction to the jury. — *Philips v. Doe d. Tucker*, 123
3. The admission of illegal evidence, or the giving of erroneous instructions to the jury, cannot be assigned for error, unless such evidence or instructions are shown by a bill of exceptions. — *Holliday v. Coe*, 26
4. Instructions given to the jury will be presumed to be correct, where the transcript does not profess to contain all the evidence. — *Ashby v. West*, 170
5. Irrelevant instructions, or harmless erroneous instructions, given to the jury, furnish no ground for reversing a judgment. — *Sherry v. Reynolds*, 201
6. Instructions given to the jury cannot be objected to in the Supreme Court, unless they were excepted to in the Court below. — *Heaton v. Colgrove*, 265
7. Where an instruction given to the jury is such that the party objecting to it has no ground to complain thereof, it will not be inquired whether the instruction was correct as an abstract legal proposition. — *Huff, Administrator, v. Earl*, 306
8. Instructions to the jury should not assume that facts recapitulated in them have been proved. — *Conaway v. Shulton*, 334
9. The plaintiff's attorneys in the present cause having been improperly allowed to argue to the jury that the fact of the defendant's having procured a change of venue was a circumstance which should weigh against him, the defendant asked the Court to instruct the jury that they had nothing to do with the fact, and that it could not properly prejudice the defendant or his cause. *Held*, that the instruction should have been given. *Ibid.*
10. Where there is evidence before the jury tending to establish a fact, it is the duty of the Court, where a specific instruction, correct in point of law, is asked for in relation to the fact, to give it. *Ibid.*
11. Objections to instructions given to the jury will not be regarded, if the record does not show that the instructions were excepted to when they were given, or at any time before the jury gave their verdict. — *Heeler v. Degant*, 501

12. Where an instruction given to the jury is objected to, but the evidence given at the trial is not contained in the record, and it does not of itself appear to be objectionable, the verdict of the jury will not be set aside.—*Conklin v. The White Water Valley Canal Company*, 506
13. It is not the duty of the Court to give irrelevant instructions to the jury.—*Hamilton v. The State*, 552

INTEREST.

See EVIDENCE, 27. JUDGMENT, 1. USURY.

1. Interest is allowable, under the statute, for a vexatious delay of payment for work. *McKinney v. Springer*, 59
2. A justice of the peace has no authority to render a judgment bearing more than legal interest, even by the consent of the parties.—*Berry v. Makepeace*, 154
3. A judgment was rendered by a justice of the peace, while the statute of 1838 was in force, by the consent of the defendant, bearing 10 per cent. interest. Held, that this was not a valid contract under that statute for the payment of that rate of interest. *Ibid.*
4. Where one of several defendants in such a judgment has paid 10 per cent. interest thereon, he is a proper party to sue for the excess paid over the legal rate. *Ibid.*
5. An action for money had and received lies at common law to recover back an excess of interest paid over that established by statute. *Ibid.*

J.

JOINT AND SEVERAL.

See PLEADING, 21.

The language of a bond was as follows: Know all men that we, A. B., C. D., and E. F., are held and firmly bound unto, &c., in the sum, &c., for the payment of which, &c., we bind ourselves, &c., severally and firmly by these presents. Held, that the bond was joint as well as several.—*Willey et al. v. The State ex rel. Smith*, 500

JUDGMENT.

See ACCORD AND SATISFACTION, 2. ATTACHMENT, 2, 3. ATTORNEY AT LAW, 3. BASTARDY, 4, 5. CLERK OF THE CIRCUIT COURT. EVIDENCE, 11. JUSTICE OF THE PEACE, 5. MONEY HAD AND RECEIVED, 2. PARTNERS, 1. PRACTICE, 34, 35. REPLEVIN-BAIL, 1.

1. A judgment upon the award of referees may properly include interest from the

time of the award until judgment is rendered thereon.—*Kintner v. The State ex rel. Skellon*, 86

2. To an action brought upon a judgment rendered in another state, the defendant may show, by evidence *dehors* the record, that he was not within the jurisdiction of the Court at any time between the commencement of the action and the recovery of the judgment; and that an attorney who undertook to appear for him, had no authority to do so.—*Boylan v. Whitney et al.*, 140
3. The Court has no right to exclude such evidence because the deposition containing it contains also evidence tending to prove that the judgment was rendered upon a partnership-debt, and that the defendant's partner employed the attorney on behalf of, and that judgment was rendered against, the firm. *Ibid.*
4. Trespass *quare clausum fregit*. Pleas—1. The general issue; 2. *Liberum tenementum*; 3 and 4. Leave and license for a special purpose; 5. Leave and license generally. Replication to the second plea, *De injuria*; to the third and fourth, That the defendant committed unnecessary damage; to the fifth, *De injuria*. Rejoinder to replication to third and fourth pleas, that the defendant committed no unnecessary damage, &c. Verdict for the plaintiff on the issue raised by the third and fourth pleas, and for the defendant on that raised by the fifth plea. Judgment for the defendant. Held, that the judgment was right.—*Reedman v. Taylor*, 144
5. A judgment may be discharged by the receipt of assigned notes of a less amount than the judgment in satisfaction thereof.—*Jones et al. v. Ransom*, 327
6. A judgment rendered on a new trial will not be reversed because the new trial was granted upon insufficient grounds, if the adverse party has admitted before the Court below the truth of a material part of the evidence to admit which the new trial was granted.—*Houck v. Deitz*, 385
7. The purchase by a firm of a judgment against one of its members and other persons, the assignment being taken in the name of a member who was not a party to the judgment, is not a satisfaction of the judgment.—*Owensby v. Platt*, 459
8. A note was executed in Ohio by a citizen of this state payable without any relief whatever from valuation or appraisement laws of Indiana. Suit was brought upon the note in this state against the maker, and the Court rendered judgment for the amount thereof, and, also, that the same should be collected without relief from

the valuation laws of *Indians*. *Held*, that the judgment that it should be thus collected, was right.—*Little v. White et al.*, 544

JURISDICTION.

See COMMISSIONERS, BOARD OF. COMMON PLEAS, 1. JUSTICE OF THE PEACE, 5. PRACTICE, 24. PROBATE COURT, 1. REPLEVIN, 2, 3.

At the term of the *Decatur* Circuit Court in which an indictment for murder was found, the defendant moved the Court for a change of venue. The Court granted the motion, and entered, on the Court docket, an order for the change of venue to the *Ripley* Circuit Court; but the clerk neglected to enter the order on the order-book. A transcript of the proceedings in the cause in the *Decatur* Circuit Court, except said order on the Court-docket, was made out by the clerk of that Court and duly certified by him under the seal of the Court. That transcript, with the indictment and other papers in the cause, was, on the 22d of July, 1851, delivered to the Clerk of the *Ripley* Circuit Court, who, on the day last named, filed the same in his office. After the motion for the change of venue was made, several witnesses were recognized in the *Decatur* Circuit Court, to give evidence, in the *Ripley* Circuit Court, in the cause, and their recognizances were recorded on the 22d of July, 1851, in the *Ripley* Circuit Court. On the 23d of September, 1851, the clerk of the *Decatur* Circuit Court filed in the clerk's office of the *Ripley* Circuit Court, as one of the papers in the cause, a certified statement of the order for a change of venue, as entered as aforesaid on the Court-docket of the *Decatur* Circuit Court. Afterward, on the day last named, the parties appeared in the *Ripley* Circuit Court, and the Court, on the defendant's motion, continued the cause until the 29th of September, 1851. The defendant then objected to the jurisdiction of the *Ripley* Circuit Court, on the ground that there had been no order, by the *Decatur* Circuit Court, for a change of venue. *Held*, that the objection was correctly overruled.—*Bennett v. The State*, 167

JUROR.

See AFFIDAVIT.

1. The circumstance that a juror is related to one of the parties by marriage with his niece, is a sufficient cause of challenge by the adverse party.—*Trullinger v. Webb*, 198

2. A party may object to the examination of a juror without oath, as to his competency; but if he permits the question to be put to the juror, and answered by him, without requiring him to be sworn, he waives the objection. *Ibid.*

JUSTICE OF THE PEACE.

See APPEAL, 1, 2. REPLEVIN, 2, 3.

1. Suit against an administrator and his sureties, before a justice of the peace. The demand stated that the plaintiff was the widow of the intestate, and entitled, under the statute, to certain personal property of the estate, which property she had demanded of the administrator. That statement was filed, with a copy of the administration-bond, as the cause of action. *Held*, that, under the R. S. 1843, the cause of action was sufficient.—*Walker v. Prather et al.*, 112
2. A justice of the peace has no authority to render a judgment bearing more than legal interest, even by the consent of the parties.—*Berry v. Makepeace*, 154
3. A judgment was rendered by a justice of the peace, while the statute of 1838 was in force, by the consent of the defendant, bearing 10 per cent. interest. *Held*, that this was not a valid contract, under that statute, for the payment of that rate of interest. *Ibid.*
4. Where one of several defendants in such a judgment has paid 10 per cent. interest thereon, he is a proper party to sue for the excess paid over the legal rate. *Ibid.*
5. A justice of the peace has no jurisdiction of a cause where his brother-in-law is the plaintiff; and a judgment for the plaintiff in such a case is *coram non judice* and void.—*Dawson et al. v. Wells*, 398
6. The plaintiff who causes an execution to be issued on such a judgment and the justice who issues it, being thus related, are liable in trespass *de bonis asportatis* to the party whose goods are sold under the execution. *Ibid.*
7. The name given to an action, in a justice's Court, is, under the R. S. 1843, immaterial, and a statement of demand, though very informal, is sufficient.—*Taylor v. Webster*, 513

L.

LACHES.

See PROMISSORY NOTES, 9, 10.

LAFAYETTE, TOWN OF.

1. The clause in the charter of the town of

Lafayette which makes it the duty of the marshal to suppress all riots, disorders, disturbances, and breaches of the peace, and with or without process to apprehend all disorderly persons or disturbers of the peace and convey them before a justice, &c., does not authorize the marshal to arrest an offender, without process, for a breach of the peace, after the offense has been committed and the disturbance has ceased.—*Pow v. Beckner et al.*, 475

2. The marshal who makes the arrest, and persons who, under his command, assist him, under such circumstances, are liable in trespass to the party arrested. *Ibid.*

LANDLORD AND TENANT.

1. A person in possession of land, with the consent of the owner, under a contract of purchase which is not completed, is a mere tenant at will.—*Manchester et al. v. Doddridge*, 360
2. Such tenancy determines by the death of the lessor. *Ibid.*

LAWRENCEBURGH AND UPPER MISSISSIPPI RAILROAD COMPANY.

The 15th section of the charter of the *Lawrenceburgh and Upper Mississippi Railroad Company* does not preclude the company from prosecuting a writ of error to the Supreme Court from an award of damages for land taken by the company in the construction of their road, although that section states that the judgment of the Circuit Court shall be final.—*The Lawrenceburgh and Upper Mississippi Railroad Company v. Smith*, 253

LEASE.

See DAMAGES, 2.

1. A lease of land contained an agreement that the lessee should pay a specified rent, at periods stated, and should he, at any time during the term, neglect or refuse to pay the rent when due, he thereby authorized the lessor to re-enter upon and take possession of the premises, without hindrance. *Held*, that to work a forfeiture of the lease for the non-payment of rent, a demand of the rent should have been made on the premises, just before sun-set of the day when it became due.—*Philips v. Doe d. Tucker*, 132
2. On this point, the R. S. 1843 have not changed the common law. *Ibid.*
3. The lease contained a covenant that no wheat, &c., or other article, used or growing on the premises, should be taken off until the full amount of the rent coming to the lessor had been paid. *Held*, that

a breach of this covenant did not work a forfeiture of the lease. *Ibid.*

4. A. agreed orally with B. to sell B. his farm for a price specified, conditionally, as follows: A. was to go to *Iowa* to look at the country, and B. was to furnish him with a specified number of land-warrants, when he was ready to start. A. was to put B. in possession of certain fields, forthwith, which B. intended to plant with corn, and was to allow B. to stable his horses in the barn while he was cultivating the corn. If A. liked *Iowa* when he got there, B. was to keep the farm at the price agreed upon, and, in that event, was to pay A. 2 dollars an acre for two fields of wheat on the farm; but if A. did not like *Iowa*, there was to be no sale of the farm, and B. was to pay him rent for the corn-ground at the rate of 2 dollars an acre. Pursuant to the agreement, A. gave to B. possession of said fields which were to be put in corn, which B. plowed and planted, stabling his horses in the barn while doing so. *Held*, that there was no valid contract for the sale of the land. *Held*, also, that the agreement between the parties amounted merely to a lease of the corn-ground.—*Jarvis v. Sutton*, 289
5. After the making of said contract, A. agreed orally with B. to give him the rent of the corn-ground, and the wheat in a wheat-field on the premises, if he would relinquish his purchase, A. at the same time pointing to the field. B., afterward, pursuant to the agreement, did so, and cut and carried away the wheat in said field. *Held*, that the agreement of A. was without consideration, and that B. was liable for the value of the wheat, upon a count for goods sold and delivered. *Ibid.*

LEGISLATURE.

See RAILROADS.

The legislature may take public property for any particular public use, or delegate to a company the authority to do so, without making any provision for compensation.—*The Indiana Central Railway Company v. The State of Indiana et al.*, 421

LETTER OF ATTORNEY.

See POWER OF ATTORNEY.

LEX LOCI.

See CONVEYANCE, 4.

LICENSE.

See PLEADING, 41.

LIEN.

See GOODS SOLD AND DELIVERED.

LIMITATIONS, STATUTE OF.

See EVIDENCE, 13. ORDER, 3. PLEADING, 10.

1. Where work is done and materials furnished in continuation of an entire job, if one of several items is within the period of the statute of limitations, the statute does not bar the recovery upon any.—*McKinney v. Springer*, 59
2. In disseizin, the statute of limitations in force when the suit was commenced and tried, governs the case.—*Manchester et al. v. Doddridge*, 360
3. A. died in 1822, seized in fee of a tract of land in this state, leaving B., his son, and C. and D., the children of a deceased daughter, and others, his heirs at law. B. was, at that time, in possession of the land as a tenant at will. He continued in possession afterward, claiming the land under the last will of A., which turned out to be invalid, and made lasting and valuable improvements on the premises, under a constant claim of exclusive title, until his death, which occurred in 1841; after which his widow continued in possession of the land, it having been assigned to her in 1845 as her dower. The possession of B. and his widow had been quiet and undisturbed. C. was born in December, 1806, and D. in December, 1810, and they brought this suit against the widow of B. in August, 1847, for certain undivided shares of the land, as representatives of their mother. Held, that, under this state of facts, the jury was authorized to presume an adverse possession by B. of sufficient length, under the statute of 1846, to bar the action. *Ibid.*

LOAN.

See BILLS OF EXCHANGE, 6. USURY, 2.

LOST NOTE.

See PROMISSORY NOTES, 20, 21.

M.

MADISON, CITY OF.

The capital stock of the *State Bank of Indiana*, situate within the limits of the city of *Madison*, is not, nor is any part of it, subject to a tax for city purposes, imposed by the authorities of said city.—*The State Bank v. The City of Madison*, 43

MADISON INSURANCE COMPANY.

See ARBITRATION.

MANDAMUS.

1. The writ of *mandamus* is the proper remedy for the state to compel an officer to perform a public duty.—*Hamilton, Auditor of Marion County, v. The State ex rel. Bates*, 452
2. A *mandamus* to compel a county auditor to issue his duplicate for the tax on real property without adding to the valuation thereof an illegal *per cent.*, is a case for the enforcement not of a private but a public duty. *Ibid.*
3. The relator, in an application for a *mandamus* for the enforcement of a public right, need not have a special interest in the matter, nor be a public officer, but any private citizen, having a general interest in the matter, may be a relator. *Ibid.*

MARRIAGE, PROMISE OF.

1. In an action for the breach of a promise of marriage, the plaintiff may prove by parol that letters passed between the parties, without producing the letters.—*Conaway v. Shelton*, 334
2. Case for the breach of a promise of marriage. Pleas, 1. The general issue; 2. That when the promise was made the defendant was an infant. Replication to this plea, that the defendant ratified the promise after attaining to majority, and issue thereon. After the evidence was heard, the defendant asked the Court to instruct the jury that, if the defendant was an infant when the plaintiff assumed that the promise was made, to find him guilty they must find that the promise was made while he was under age, or they could not inquire as to what he had said or done, after he became of age, that might look like a ratification of the contract. Held, that the instruction was properly refused. *Ibid.*

MISREPRESENTATION.

See CHANCERY, 13, 14.

MISTAKE.

See CHANCERY, 5.

MONEY HAD AND RECEIVED.

See MONEY PAID, 2, 3.

1. An action for money had and received lies at common law to recover back an excess of interest paid over that established by statute.—*Berry v. Makepeace*, 154

2. A suit was commenced in the Circuit Court and a judgment obtained in the name of A., without his knowledge or direction, for the benefit of another person, A. having no interest in the subject-matter. A part of the judgment was paid to the attorneys of record, but A. never received any of it. The judgment was afterward reversed by the Supreme Court, and the cause remanded to the Circuit Court, where it was dismissed. *Held*, in a suit against A. to recover back the money, that he was not liable therefor.—*Balle v. Haines*, 461

MONEY PAID.

See PRINCIPAL AND SURETY, 2.

1. Money due to the plaintiff, and improperly received by the defendant, cannot be recovered in an action for money paid.—*Conklin v. Smith*, 284
2. Money paid to the defendant under a mistake of facts, cannot be recovered under a count for money paid. The proper form of action is for money had and received. *Ibid.*
3. To sustain a count for money paid, there must have been a payment of money by the plaintiff to a third party, at the request of the defendant, express or implied, on a promise, express or implied, to repay the amount. *Ibid.*

MORTGAGE.

See CHANCERY, 7, 15, 17, 18.

Where a mortgage is given to secure the payment of a note, any act which discharges the note, discharges, also, the mortgage.—*Sherman et al. v. Sherman*, 337

MURDER.

See HABEAS CORPUS, 3.

N.

NEGLIGENCE.

See CORPORATION, 1.

NEW ALBANY, CITY OF.

The share of a part owner of a steam-boat which runs on the Ohio and Mississippi rivers, and occasionally touches at the city of New Albany in the course of her voyages, is not liable to be taxed, under the charter of said city, merely from the fact that such part owner is a citizen of that place.—*The City of New Albany v. Meekin*, 481

NEW ASSIGNMENT.

See PLEADING, 33.

VOL. III.—78

NEWCASTLE AND RICHMOND RAILROAD COMPANY.

1. In 1848, the legislature chartered *The Newcastle and Richmond Railroad Company* for the construction of a railroad from Richmond, in Wayne county, to Newcastle, in Henry county. In 1851, the legislature amended the charter of the company by authorizing them to extend said road from Newcastle to intersect the *Peru and Indianapolis Railroad* or the *Lafayette and Indianapolis Railroad* at such point on said roads as the *Newcastle and Richmond Railroad Company* might select. *Held*, that the terminus to which the *Newcastle and Richmond Railroad* might be extended, under said amendment, was sufficiently fixed, and that the grant of the right to make such extension was not void for the uncertainty of such terminus.—*The Newcastle and Richmond Railroad Company v. The Peru and Indianapolis Railroad Company*, 464
2. The *Newcastle and Richmond Railroad Company* have a right, under their charter, to have a sufficient quantity of the land over which the *Peru and Indianapolis Railroad* passes condemned for the purposes of their road, and the fee-simple vested in themselves; but this will be subject to the right of way of the *Peru and Indianapolis Railroad Company*. *Ibid.*

NEW TRIAL.

See CHANCERY, 16. PRACTICE, 19, 62, 80.

NEXT FRIEND.

See PRACTICE, 32, 33.

NOTICE.

See ADMINISTRATOR'S SALE, 2. BILLS OF EXCHANGE, 3. PROMISSORY NOTES, 6, 7, 8. VENDOR AND PURCHASER, 7, 8.

To affect a person with notice of a fact by communications made to one alleged to have been his agent, the agency of the latter must first be proved.—*Jones et al. v. Ransom*, 327

O.

OFFICIAL BOND.

See COSTS, 1, 2.

ORDER.

1. A. executed a written order directed to B. requesting him to pay C. a sum specified, when B. should collect that amount for A. *Held*, that the order was *prima facie*

an acknowledgment that the sum specified was due from A. to C.—*Spangler et al. v. McDaniel*, 275

2. Such an order is assignable, under the R. S. 1843, and can be made the foundation of an action. *Ibid.*
3. The order being, in legal effect, a written acknowledgment of a debt due from A. to C., will take the debt out of the operation of the statute of limitations upon unwritten contracts; and a plea, in a suit brought upon the order, that the defendant did not undertake, &c., within six years before the commencement of the suit, is bad. *Ibid.*

OUSTER.

To establish an ouster, proof of an actual ouster is not necessary.—*Manchester et al. v. Doddridge*, 360

P.

PARTIES.

See CHANCERY, 7. INTEREST, 4. PROMISSORY NOTES, 19.

1. The assignment of a written contract for the sale of land, under the R. S. 1843, carries with it the legal title to the instrument, and upon a suit by the assignee for a specific performance, the assignor is not a necessary party.—*Colerick et al. v. Hooper*, 316
2. If A., in consideration of property conveyed to him by C., promises C. to pay a debt due by C. to B., B. cannot sue for a breach of the promise.—*Eastman v. Ramsey*, 419

PARTNERS.

See JUDGMENT, 7. PARTNERSHIP.

1. The taking of a judgment against one of two partners upon a partnership debt, discharges the other, at law, from the debt.—*Nicklaus v. Roach et al.*, 78
2. Where the partner thus discharged, being ignorant of the fact that such a judgment had been rendered, and confiding in the representations of the creditor that none had been, executed his note to the creditor for the debt, it was held, that a suit could not be maintained upon the note. *Ibid.*
3. A partner may, with the consent of his co-partner, make a valid arrangement with a creditor of the former, that a debt due by the creditor to the partnership may be discharged by deducting it as a pay-

ment, as far as it will go, from the debt of the partner to him.—*Bates v. Hallday*, 159

PARTNERSHIP.

A partnership may, after the death of a partner, be continued by a Court of Equity on behalf of the infant children of the deceased partner, if the surviving partners consent.—*Powell, Administrator, v. North et al.*, 392

PAUPERS.

See CONTRACT, 10, 11.

PAYMENT.

See PRINCIPAL AND AGENT, 2.

PERU AND INDIANAPOLIS RAILROAD COMPANY.

See NEWCASTLE AND RICHMOND RAILROAD COMPANY.

1. Section 16 of the charter of the *Peru and Indianapolis Railroad Company*, which enacts that when said company shall have procured the right of way through land, either by the voluntary release of the owner, or by condemning the same, they shall be seized in fee-simple of the right to such land, and shall have the sole use and occupancy thereof, does not vest in said company the right to the exclusive possession of the land occupied by the road, but vests the fee-simple subject to the right of the state to take the same, upon compensation being made, for the public use.—*The Newcastle and Richmond Railroad Company v. The Peru and Indianapolis Railroad Company*, 464
2. The clause in said charter immediately following that last cited, is, that "no person, body politic or corporate, shall in any way interfere with, molest, disturb, or injure any of the rights or privileges" thereby "granted, or that would be calculated to detract from or affect the profits of said corporation." Held, that the state did not thereby relinquish the right to charter any other company whose improvement would compete with said *Peru and Indianapolis Railroad*, nor the right to take the franchise of the road for public use; but said clause restrains such other company from committing any unauthorized illegal injuries. *Ibid.*

PHYSICIAN.

1. A *post mortem* examination made by a physician, at the request of the coroner, is not a service covered by the physician's

- employment to attend upon the county poor.—*Gaston v. The Board of Commissioners of Marion County*, 497
2. A physician is not entitled to any greater compensation for traveling to and giving evidence at a coroner's inquest, in obedience to a subpoena, than any other witness. *Ibid.*
 3. The expenditure of labor and skill by the physician in a *post mortem* examination, will, however, entitle him to additional compensation. *Ibid.*
 4. The coroner may, where a *post mortem* examination is necessary, employ a physician to make the examination, and the county will be liable for the expense. *Ibid.*
 5. The board of commissioners of a county have jurisdiction of the claim of a physician for services rendered in a *post mortem* examination made at the request of the coroner, and the judgment rendered by the board on the claim, if brought before them according to the statute, is, while unversed, conclusive. *Ibid.*
 6. To give the board jurisdiction of the claim, it is not necessary that it should be brought before them like a formal suit at law. *Ibid.*
- defense of the adverse party, cannot be pleaded by the latter as a valid defense to an action at law by the former upon the award. *Ibid.*
5. In a suit by *A.* and *B.* before a justice of the peace, the defendant pleaded to the declaration that the suit was brought in the names of *A.* and *B.* for the use and benefit of *A.*, *B.* having no interest therein; that *A.*, before and at the commencement of the suit, and still, was the owner of the note; and that he, the defendant, had fully paid and satisfied the note, in this, to-wit, that *A.*, at the commencement of the suit, and still, was justly indebted to him, the defendant, 75 dollars for work and labor, &c. Held, that the plea was valid in bar of the action.—*Forkner et al. v. Dinwiddie*, 34
 6. The assignment of errors by the executor of a judgment-plaintiff, should contain an averment of the matter which makes the executor privy to the judgment, and establishes his right to sue; otherwise, the assignment will be objectionable on demurrer.—*Rundles et al. v. Jones*, 35
 7. The plea in *nulla est erratum* to the assignment of errors of an executor, admits his representative character. *Ibid.*
 8. One of several material facts averred in a plea may properly be traversed by the replication.—*The White Water Valley Canal Company v. Henderson*, 3
 9. Debt by the assignee of sealed notes for the payment of money, against the maker. Pleas—1. That the consideration of the notes was the sale and assignment from one *I.* to the defendant, of the full and exclusive right and liberty of making, constructing, and vending to others to be used, a certain improvement in the lamp, described in a schedule attached to, and forming a part of, said sale and transfer, signed by the pretended inventor, to-wit, one *H.*, for the term of 14 years from the date of the letters patent, to-wit, &c., within the state of, &c., and that said supposed improvement in the lamp, at the time, &c., and still, was of no value whatever. 2. That the only consideration of the notes was the sale and transfer of the right mentioned in the first plea, and that said *I.*, combining with one *W.*, to whom the notes were made payable, falsely and fraudulently represented that said improvement in the lamp would burn, by one filling with oil, for the space of six hours, whereas, in truth, it would burn for a space of time less than three hours and thirty minutes, and that it would cost but 16 cents to construct one of said lamps, whereas, in truth, it would cost 37½ cents, all which was well known to said *I.* and
- PLANK-ROADS.
See CORPORATION, 4, 5, 6, 7.
- PLEADING.
- See ALIMONY. BASTARDY, 1. CHANCERY, 16. CONTRACT, 21, 23. COVENANT, 1. EVIDENCE, 18. JUDGMENT, 4. MONEY PAID. ORDER, 3. PROMISSORY NOTES, 1, 2, 3. PRACTICE, 8, 18, 28, 34, 35, 40, 68, 70. SLANDER, 1, 2, 3, 5, 7, 8, 9.
1. A writ of *scire facias* to revive a judgment stated the time of the rendition of the judgment, that execution remained to be done, and commanded the sheriff to summon the defendant to answer why the plaintiffs should not have execution. Held, that the writ averred, substantially, that the judgment remained unsatisfied.—*Davidson et al. v. Alvord et al.*, 1
 2. One of several material facts averred in a plea may properly be traversed by the replication.—*The White Water Valley Canal Company v. Henderson*, 3
 3. The discovery of evidence unknown to a party at the time of a former trial, cannot be made the basis of a good plea in a collateral suit. *Ibid.*
 4. The fraudulent concealment by a party to an arbitration, of a fact material to the

- W. Held*, that the pleas were bad on general demurrer.—*Hardesty v. Smith*, 39
10. To a declaration upon the common counts for work and labor, the defendant pleaded as follows: 1. That the causes of action did not accrue within five years, &c.; 2. That the defendant did not, at any time within five years, &c., undertake and promise, in manner and form, &c. *Held*, that the pleas were identical.—*McKinney v. Springer*, 59
 11. Debt by *The State* on the relation of *S.*, the school commissioner of *Cass* county, against *K.*, the former school commissioner, and his sureties, upon the official bond of *K.* The declaration showed that *K.* had been elected to the office for three terms successively, and up to the time of the relator's appointment; and the suit was upon the first bond of *K.* A breach alleged was that *K.*, during his first term, received from the sale of school lands, &c., divers large sums of money, which he wasted and converted to his own use during said first term, and that, although specially requested by the relator, as his successor as aforesaid, to pay the same to him, *K.* refused to do so. *Held*, that the breach sufficiently negated a payment of the money by *K.* to his immediate successor, viz., himself.—*Kintner et al. v. The State ex rel. Skelton*, 86
 12. In debt upon a bond with conditions, a general demurrer to the entire declaration will not be sustained, if one of several breaches assigned is sufficient. *Ibid.*
 13. Trespass *quare clausum fregit*. Pleas—1. The general issue; 2. *Liberum tenementum*; 3 and 4. Leave and license for a special purpose; 5. Leave and license generally. Replication to the second plea, *De injuria*; to the third and fourth, That the defendant committed unnecessary damage; to the fifth, *De injuria*. Rejoinder to replication to third and fourth pleas, that the defendant committed no unnecessary damage, &c. Verdict for the plaintiff on the issue raised by the third and fourth pleas, and for the defendant on that raised by the fifth plea. Judgment for the defendant. *Held*, that the judgment was right.—*Redman v. Taylor*, 144
 14. A plea of payment contained also two items of set-off, one of which was clearly inadmissible as such. *Held*, that the plea was not bad, on general demurrer, on that account.—*Bates v. Halliday*, 159
 15. In replevin in the detainer, the general issue, under the R. S. 1843, puts in issue the property of the plaintiff.—*Ashby v. West*, 170
 16. In a suit upon a promissory note by the assignees against the maker, the latter may plead under the R. S. 1843, by way of set-off, an individual account which he had against any assignor prior to notice of the assignment.—*Sample v. Lamb*, 180
 17. In debt upon a bond, the plea of *nil debet* is bad upon general demurrer.—*Parish et al. v. The State ex rel. McFadden et al.*, 209
 18. Decree in the Probate Court for the sale of real estate of an intestate upon the petition of the administrator. Assignment of error in the Supreme Court, that a final decree was taken against an infant defendant, *A.*, without the appointment of a guardian *ad litem* for her, and upon the appearance by attorney. Plea to the assignment, that at the time of the rendition of the decree, the said *A.* was of full age. *Held*, upon demurrer, that the plea was bad.—*Timmons et al. v. Timmons*, 251
 19. Assumpsit by *C.*, the payee, against *A.*, upon a written order drawn by *A.* upon *B.* for the payment to *C.* of a specified sum when *B.* should collect the same for *A.* The declaration alleged, generally, a presentment of the order to the executor of *B.*, and his refusal of acceptance and payment, and that *B.* died before it was presented to him; but did not show when the order was presented for acceptance and payment, nor that notice of the non-acceptance and non-payment had been given; but it averred that, before the presentment, *A.* had withdrawn his funds from *B.*'s hands, that none ever came into the hands of his executor, and that *A.* suffered no loss by the delay of presentment and the want of notice. *Held*, that the declaration was good.—*Spangler et al. v. McDaniel*, 275
 20. In a suit brought by a corporation, a plea that, at the commencement of the suit, there was no such corporation in existence as the plaintiffs, is substantially good.—*Morgan v. The Lawrenceburgh Insurance Company*, 285
 21. A declaration against one of several makers of a joint and several promissory note, need not notice that the other makers executed the note. *Ibid.*
 22. A plea to a petition for the assignment of dower, alleged that the dower of the widow was barred by a decree of the *Decatur* Circuit Court theretofore rendered, &c., but made no further mention of the decree. *Held*, that the plea was bad for not setting out the decree.—*Thrap v. Johnson et ux.*, 343
 23. To a petition for the assignment of dower

- er by the widow of a devisee of land devised upon a condition subsequent, a plea alleging as a defense the non-performance of the condition, but not showing that the defendant is an heir of the devisor, is bad. *Ibid.*
24. The plaintiff who, after a demurrer to a plea has been overruled, replies to the plea, waives all objection to the overruling of the demurrer.—*Harbert v. Dumont et al.*, 346
25. The party in whose favor a demurrer has been decided, cannot complain of the decision. *Ibid.*
26. When a judgment has been rendered for the plaintiff, he cannot complain that a demurrer to a plea was overruled, which, if valid at all, was a bar to the whole action.—*The State ex rel. Crandall v. Mann et al.*, 350
27. In a suit brought upon a note by the assignee of an administrator, a plea alleging that the right of the administrator to make the assignment had ceased before he made it, is a special plea of non-assignment, and must, under the R. S. 1843, be verified by oath.—*Thomas v. Reister, Administrator*, 369
28. When the general issue and a special plea are filed to the action, and the matter alleged in the special plea is admissible under the general issue, the defendant cannot complain that a demurrer to the special plea was improperly sustained. *Ibid.*
29. The omission of a similiter to the general issue is immaterial after verdict.—*Templin v. Krahn*, 373
30. To a suit by the payee against A. and B., the makers, upon a promissory note payable at a day specified, the defendant pleaded the following pleas in bar: 1. A parol contract, entered into between the parties, when the note was made, by which the plaintiff was never to sue on the note; 2. That, after the execution of the note by A., to-wit, &c., a parol agreement was made by the parties that if B. would sign the note as surety, the plaintiff would never sue on the note, but would receive the interest thereon, unless A. should deny the note and not try to pay the same. Averment, that the interest had been paid, and that A. had never denied the note. General demurrer to both pleas. *Held*, that the first plea was insufficient. *Held*, also, that, supposing that the second plea had also showed that B. at the time of said parol agreement, or afterward and in pursuance of it, had executed the note, still it would have been insufficient. *Held*, also, that if said second plea did not show that B. executed the note in pursuance of the parol agreement, the plea was bad for not showing that the condition had been performed, upon the performance of which the promise not to sue was made.—*Withrow et al. v. Wiley*, 379
31. In a declaration upon a note, the day on which the note is alleged to have been executed is not traversable. *Ibid.*
32. A special plea of set-off which professes to answer the whole declaration, but answers only a part, is bad on general demurrer.—*Conklin v. Walts*, 396
33. Trespass *quare clausum fregit*. Plea, *liberum tenementum*. Replication, by way of new assignment, as follows: That the piece of land in the declaration mentioned was and is a certain close, situate, &c., and bounded as follows: (the boundaries are here set out); that said close now is and at said time when, &c., was in the lawful and peaceable possession of the plaintiff; which said close now is, and, at said time when, &c., was another and different close from the said close in the said plea mentioned and therein alleged to be the soil and freehold of the defendant. Verification. *Held*, that the new assignment was sufficient.—*Halsey v. Mattheus*, 404
34. In replevin, damages cannot be assessed beyond the amount claimed in the declaration.—*O'Neal v. Wade*, 410
35. To the declaration on a replevin-bond the defendant pleaded that the plaintiff ought not to maintain his action, because the suit in replevin was dismissed by agreement of the parties. *Held*, that the plea was bad: 1. Because it attempted to show a discharge of a specialty by parol; 2. Because the agreement would not include an agreement to dispense with a return of the property, without which the dismissal would itself be a breach of the condition of the bond. *Ibid.*
36. In a suit by the assignee of a note against the maker, the latter may plead and prove that the plaintiff holds the note merely as a trustee of the payee, in order to let in as a set-off an indebtedness of the maker to the defendant.—*Henry v. Scott*, 412
37. The setting aside of a special plea cannot be complained of when another remains under which the defense set up in the former plea could be proved in bar of the action.—*Wood v. Commons*, 418
38. A Court of equity will not render a decree setting aside a conveyance of land made to hinder and delay creditors, where the bill does not pray for such decree.—*Eastman v. Ramsey*, 419

39. A declaration founded on a written instrument, though the instrument is without date, should allege a day, month, and year, as the time of its execution; and if the allegation is omitted, the declaration is bad on special demurrer.—*Givan v. Swadley*, 484
40. Debt upon a promissory note for 70 dollars. The defendants pleaded, that the plaintiff had previously purchased a printing-office and fixtures of A. and B. at a price specified, and had given them a mortgage to secure the purchase-money; that, on the same day, the plaintiff sold the printing-office, &c., to the defendants for 70 dollars, and took their note therefor, being that sued on, and that the defendants were to have the privilege of purchasing the claim of A. and B. upon such terms as they could, and if they should make the purchase so as to release the plaintiff from any liability to A. and B., the defendants were to have the ownership upon paying the plaintiff the amount specified in said note; but if they should not make the purchase, they were to pay said sum of 70 dollars for the use of the property a year, during which time the plaintiff agreed to assure the possession of it. The plea then averred that the defendants had purchased the claim of A. and B. and procured the plaintiff's release from all claims of A. and B. for the purchase-money, whereby they became invested with the entire property in the printing-office, &c., and so the consideration of the note had failed. *Held*, that the facts showed no failure of consideration, and that the plea was bad.—*Houell v. Lemon et al.*, 492
41. If a plea of license answers the gravamen of the declaration, proof of the license will defeat the suit.—*Conklin v. The White Water Valley Canal Company*, 506
42. Suit upon an administrator's bond given for the faithful application of the proceeds of real estate of the intestate which the administrator had procured an order to sell. Plea, *nul debet*, and issue on the plea. *Held*, that the plea was not a nullity. *Held*, also, that it was incumbent upon the relator, under the issue, to prove all the material averments in the declaration except the execution of the bond.—*Kirkpatrick v. The State ex rel. Kirkpatrick*, 521
43. Debt upon an appeal-bond. The condition of the bond was as follows: That whereas M. had, on the day of executing the bond, obtained an appeal from the judgment of the *Hendricks* Circuit Court on said day rendered against him in a case wherein *John Doe*, on the demise, &c., was plaintiff, and said M. was defendant; now should said M. duly prosecute his said appeal and pay any judgment or costs which might be rendered or affirmed against him, then the bond was to be void. The first breach assigned was, that said M. did not duly prosecute his appeal from the judgment of said Court in said suit, &c., against him, according to the condition of said bond, but therein wholly failed. *Held*, that the breach was bad. The second breach, after alleging, as in the first, that the appeal had not been duly prosecuted, averred that the appeal was dismissed by the Supreme Court, on, &c., whereby the plaintiff was kept out of the occupation of 160 acres of land, the rent of which was worth, &c. *Held*, that the plaintiff's claim for rents and profits was not provided for by the condition of the bond, and that the breach was bad. The third breach, after alleging, as in the first, that the appeal-bond had not been duly prosecuted, averred that the appellant had not paid the judgment and costs which were adjudged against him on, &c., by the Supreme Court for — dollars and — cents, according to the condition of said bond, but therein wholly failed, to the plaintiff's damage, &c. *Held*, that, were there no other objection to the breach than its omitting to state the amount of said judgment, this omission would show it to be insufficient.—*Malone v. McClain et al.*, 532
44. A note executed to *Lorena Emerine Evans*, and assigned on the back thereof to the plaintiffs by *George Smith* and *Lorena Emerine Smith*, was filed before a justice of the peace as a cause of action, and a judgment rendered against the maker by default. There was no averment showing that *Lorena Emerine Evans* and *Lorena Emerine Smith* were the same person. On appeal, in the Circuit Court, the defendant moved the Court to dismiss the suit. *Held*, that the motion should have been sustained.—*Evans v. Secrest et al.*, 541
45. In a declaration upon a note, the allegation of the non-payment of the note or any part thereof, is a sufficient breach.—*Evans v. Secrest et al.*, 545
46. Where a plea is a good defense to all the legal causes of action described in the declaration, a demurrer to it should be overruled.—*First v. Bonewits*, 546
47. Each count in a declaration is considered as containing a distinct cause of action.—*Markin v. Jorrigan*, 548
48. If a plea be double, the plaintiff may demur to it for duplicity; but if he reply,

he must answer both parts of the plea.—
Barrett v. Ruitt, 571

POOR.

See CONTRAOT, 10, 11.

POSSESSION.

See CO-PARCEENERS. LIMITATIONS, STATUTE
OF, 3.

Where a title-bond for the conveyance of
land is silent as to the time when the
obligee is to have possession, the latter is
not entitled to the possession before the
the time of receiving his deed.—*Wright*
v. Blachley et al., 101

POST-MARKS.

See EVIDENCE, 21.

POST MORTEM EXAMINATION.

See PHYSICIAN.

POWER.

See TRUSTEE, 1.

POWER OF ATTORNEY.

1. The R. S. 1843 require that a power of
attorney to convey lands in this state,
shall be executed with the formalities re-
quired in the execution of a deed of con-
veyance.—*Butterfield et al. v. Beall*, 203
2. The certificate of acknowledgment to a
power of attorney, executed by husband
and wife in another state, to convey land
in this state, did not show that the wife
was examined without the hearing of her
husband. *Held*, that the attorney was
not authorized, under the power, to con-
vey the estate of the wife. *Ibid*.

PRACTICE.

See APPEAL. ARBITRATION, 4. AWARD, 4.
BILLS OF EXCHANGE, 4, 12. CHANCERY, 12,
18, 22. CONTINUANCE. CONTRACT, 21.
FRAUDULENT CONVEYANCE, 5. HIGHWAY,
1. INDIOTMENT, 14. INJUNCTION, 1, 2, 3,
4, 5, 6, 7. JUDGMENT, 2, 3. VERDICT, 1,
2, 3, 4, 5.

1. Where the Circuit Court before which,
and the time at which, a party is sum-
moned to appear, are specified in the writ,
he cannot object that the place where the
Court was to be held was not sufficiently
indicated.—*Davidson et al. v. Alvord et*
al., 1
2. The suggestion of the death of one of
two defendants to a *scire facias* to revive
a judgment, is equivalent to a dismissal
as to such defendant. *Ibid*.

3. A writ of *scire facias* to revive a judg-
ment may be amended under the R. S.
1843, at any time before judgment, by
striking out the name of one of several
defendants. *Ibid*.

4. The R. S. 1843 authorize the issuing of
a *scire facias* to revive a judgment against
the personal representatives of a deceased
defendant. *Ibid*.

5. Process returnable at a day fixed by law,
is deemed and taken to be returnable at
such day, by enactment of the R. S. 1843,
although a different day may be named
in the process.—*The White Water Valley*
Canal Company v. Henderson, 3

6. The admission of illegal evidence, or the
giving of erroneous instructions to the
jury, cannot be assigned for error, unless
such evidence or instructions are shown
by a bill of exceptions.—*Vickers v. Cen-*
non, 29

7. Before the rendition of judgment upon
the verdict for the plaintiff in slander,
the defendant moved for a new trial. The
Court took the motion under advisement,
and continued the cause until the next
term. The record of such next term
showed that the defendant then came and
suggested the death of the plaintiff, since
the preceding term of the Court; and that
the attorneys of record of the plaintiff
also came, and agreed to remit a specified
part of the verdict, in consideration of
which the defendant agreed that the Court,
without a decision of the motion, should
render judgment for the residue of the
verdict; which the Court thereupon did.
Held, that the record did not establish
that the plaintiff was dead when the
judgment was rendered.—*Rundles et al. v.*
Jones, 35

8. The facts that errors of law were assigned
in the Supreme Court by the executors of
the plaintiff below, and that they were
pleaded to by the defendant, furnish no
evidence that the plaintiff below was dead
when the judgment was rendered in the
Circuit Court. *Ibid*.

9. An attorney at law against whom charges
have been preferred for mal-conduct in
office, is not entitled to have the charges
tried by a jury.—*Ex parte Robinson*, 52

10. The proviso in the 11th section of the
act of 1838 regulating the practice in suits
at law, which enacts that, if in any of the
actions or suits enumerated in that sec-
tion, judgment be given for the plaintiff
and afterward reversed for error, a new
action may be commenced within a year
after such reversal, applies to suits in
chancery as well to actions at law.—*Mc-*
Kinney v. Springer, 59

11. A party who has applied to chancery for relief and obtained a decree, when his remedy was exclusively at law, may, under said proviso, at any time within a year after the reversal of such decree for error, prosecute his action for the same matter at law. *Ibid.*
12. After the transcript of a record has been filed in the Supreme Court, the Court below may correct a clerical error in the record, and upon the correction being properly certified to the Supreme Court, it will become part of the record of the latter Court.—*Jones, Administrator, v. Van Patten*, 107
13. Exceptions to the admissibility of evidence will not be regarded by the Supreme Court, in a civil action, unless they appear, by the record, to have been taken before the jury retired to deliberate upon their verdict. *Ibid.*
14. Exceptions to the instructions of the Court to the jury, will not be noticed in the Supreme Court, unless they appear, by the record, to have been taken before the jury delivered their verdict. *Ibid.*
15. It is not error for the Court to refuse to give an irrelevant instruction to the jury.—*Phillips v. Doe d. Tucker*, 132
16. In a proceeding in foreign attachment, property of the absconding debtor must have been attached in the county where the writ of attachment was issued, or a person in that county summoned as a garnishee, before process can legally issue, under the R. S. 1843, to another county, against a garnishee resident therein.—*Reinhard v. Keith*, 137
17. To authorize a judgment by default in a proceeding in foreign attachment, against a garnishee served with process in, and being a resident of, another county than that in which the writ of attachment was issued, it is necessary, under the R. S. 1843, that property of the absconding debtor shall have been attached, or a garnishee served with process, in the latter county. *Ibid.*
18. The plaintiff will not be allowed, after verdict, to amend his replication, or to file an additional one.—*Redman v. Taylor*, 144
19. An action at law was submitted, by agreement, to the president and one of the associate judges of the Circuit Court, the other being absent, for trial, and, upon hearing the evidence, the president was of opinion that the plaintiff should have judgment, and the associate that the defendant should have judgment; and they could not agree. *Held*, that under such circumstances, the cause should have been continued for a new trial.—*Irons v. Hussey*, 158
20. A bill will not lie by the children of an intestate before a final settlement of the estate and an order of distribution of the personal assets, against a third person for having received from the administrator personal property of the intestate, and wasted the same.—*Fillingim et ux. v. Wyllie et al.*, 163
21. The affidavits of individual jurors are not, on grounds of public policy, admissible to impeach their own verdict.—*Bennett v. The State*, 167
22. Instructions given to the jury will be presumed to be correct, where the transcript does not profess to contain all the evidence.—*Ashby v. West*, 170
23. In a suit upon a note given for the transfer of an interest in a patent, the questions whether a fraud was practiced or a warranty made at the time of the transfer, and if either was done, what was the value of the right transferred, are for the decision of the jury; and their verdict will not be set aside where it is not clearly shown to be unauthorized by the evidence.—*Fowler v. Swift*, 188
24. A. residing in Jackson county, and B. in Clark county, were sued in assumpsit in the Jackson Circuit Court. Each was served with process in the county where he resided. The plaintiff, afterward, by leave of the Court, amended his writ and declaration by striking out the name of A. B. was then called and defaulted, and a jury was impaneled, which assessed the damages against him. The assessment was set aside, and, on the plaintiff's motion, another jury was called and a new assessment made, and judgment was rendered thereon. *Held*, that the leave to amend was properly granted. *Held*, also, that A. and B., when served with process, were brought within the jurisdiction of the Court, and that the dismissal of the suit as to A. did not divest the jurisdiction over B., the record not disclosing that A. could not have been legally included in the judgment. *Held*, also, that the setting aside of the first assessment of damages and the awarding of another venire must be presumed, the record not showing the contrary, to be right.—*Robertson v. Thompson*, 190
25. In a proceeding in attachment against a steam-boat, under article 2 of chapter 42 of the R. S. 1843, the giving of a bond for the discharge of the boat as authorized by the Statute, operates virtually to set aside a previous judgment by default ren-

- dered against the boat.—*Carson et al. v. The Steam-Boat Telma*, 194
26. Where a judgment had been rendered by default against the boat and one of the defendants at the term of the Court next after the rendition of the judgment moved to set it aside, it was *held* that such defendant did not, by making the motion, waive any objection to the attachment. *Ibid.*
27. The giving of the bond for the purpose of having the boat discharged, is not a waiver of any objection to the attachment. *Ibid.*
28. The omission in the affidavit on which the writ of attachment issues of the name of the person who contracted the debt, is fatal. *Ibid.*
29. The circumstance that a juror is related to one of the parties by marriage with his niece, is a sufficient cause of challenge by the adverse party.—*Trullinger v. Webb*, 198
30. A party may object to the examination of a juror without oath, as to his competency; but if he permits the question to be put to the juror, and answered by him, without requiring him to be sworn, he waives the objection. *Ibid.*
31. Irrelevant instructions, or harmless erroneous instructions, given to the jury, furnish no ground for reversing a judgment.—*Sherry v. Reynolds*, 201
32. In a suit by an infant before a justice of the peace, the naming of a person as next friend, in the summons, may be considered as an appointment of the person as next friend.—*Usher v. Cornwell*, 210
33. A defendant who was sued by an infant before a justice of the peace, appeared to the suit before the justice, went to trial on the merits, and suffered judgment to be rendered against him, without making the objection that the next friend of the infant had not consented in writing to his appointment. The cause was appealed to the Circuit Court, where the defendant moved to dismiss the suit for the want of such written consent of the next friend; but the Circuit Court was not informed, by affidavit or otherwise, that the defendant did not know of the omission complained of, whilst the suit was pending before the justice. *Held*, that the Circuit Court correctly refused to dismiss the suit. *Ibid.*
34. Where the declaration consists of a special and a common count, and the evidence received at the trial is admissible under the common count, the judgment for the plaintiff will not be reversed because the special count is bad.—*Carter v. Thomas*, 213
35. Where the general issue and special pleas are filed to the action, and the defense set up in the special pleas is admissible under the general issue, the judgment for the plaintiff will not be reversed because a demurrer to the special pleas was erroneously sustained, if no injury appears to have been done. *Ibid.*
36. The revival of a judgment against the principal, by a *scire facias* issued against him alone, does not release the replevin-bail.—*Stockwell et al. v. Walker et al.*, 215
37. After the jury has been impaneled and the evidence heard, the plaintiff may, under the R. S. 1843, amend his writ and declaration by striking therefrom the names of any number of the defendants.—*Henry v. The State Bank of Indiana*, 216
38. The Supreme Court cannot say that the Circuit Court erred in overruling a motion for a continuance, when the affidavit, on which the motion was founded, refers to another affidavit as containing the facts relied upon for the continuance, which latter affidavit, though made in the same cause, is not a part of the record.—*De Puy v. Everett*, 257
39. Instructions given to the jury cannot be objected to in the Supreme Court, unless they were excepted to in the Court below.—*Heaston v. Colgrove*, 265
40. When the general issue and special pleas are filed to the action, and the defense set up in the special pleas is admissible under the general issue, it will not be examined on error whether demurrers to the special pleas were properly sustained or not.—*Cheek et al. v. Glass*, 286
41. It is immaterial whether the motion to suppress a deposition was correctly overruled or not, if the deposition was not read at the trial.—*Smith v. Smith et al.*, 303
42. The party who, after an order for a change of venue, appears by attorney and submits the cause to a jury in the Court which granted the order, waives the right to remove the cause under the order previously made. *Ibid.*
43. Where an instruction given to the jury is such that the party objecting to it has no ground to complain thereof, it will not be inquired whether the instruction was correct as an abstract legal proposition.—*Huff, Administrator, v. Earl*, 306
44. The record of the proceedings in a suit in chancery pending by writ of error in the Supreme Court, being alleged to be

- defective, the latter Court awarded a *certiorari* to the clerk of the Circuit Court to certify a complete transcript of the proceedings. The Circuit Court, after the term had expired at which the decree, which was upon default, was made, and after the *certiorari* had been issued, ordered the clerk to copy the subpoenas and returns into the record, it having been shown to the Court that, when the default was taken, proof of the service of the subpoenas had been duly made. *Held*, that it was competent for the Court to make the order.—*Colerick et al. v. Hooper*, 316
45. When a bill in chancery is against adult residents of the state, who are personally served with notice, and the allegations of the bill are certain—especially if the subject-matter of the allegations is of a certain and definite nature—a final decree, after a decree *pro confesso* upon a default, may be made without proof. *Ibid.*
46. While the law was, that, where evidence was objected to, the grounds of the objection should be stated, objections were made without assigning the reasons. *Held*, that they were correctly overruled.—*Jones et al. v. Ransom*, 327
47. Instructions to the jury should not assume that facts recapitulated in them have been proved.—*Conaway v. Shelton*, 334
48. The plaintiff's attorneys in the present cause having been improperly allowed to argue to the jury that the fact of the defendant's having procured a change of venue was a circumstance which should weigh against him, the defendant asked the Court to instruct the jury that they had nothing to do with that fact, and that it could not properly prejudice the defendant or his cause. *Held*, that the instruction should have been given. *Ibid.*
49. Where there is evidence before the jury tending to establish a fact, it is the duty of the Court, where a specific instruction, correct in point of law, is asked for in relation to the fact, to give it. *Ibid.*
50. An instruction to commissioners appointed to assign dower, to assign the same by metes and bounds, will be presumed to be right where the record does not contain the evidence.—*Thorp v. Johnson et ux.*, 343
51. Where parol evidence is admitted at the trial, without objection, the question of its admissibility cannot be raised on error.—*Harbert v. Dumont et al.*, 346
52. The plaintiff who, after a demurrer to a plea has been overruled, replies to the plea, waives all objection to the overruling of the demurrer. *Ibid.*
53. The party in whose favor a demurrer has been decided, cannot complain of the decision. *Ibid.*
54. When a judgment has been rendered for the plaintiff, he cannot complain that a demurrer to a plea was overruled, which, if valid at all, was a bar to the whole action.—*The State ex rel. Crandall v. Mena et al.*, 350
55. The verdict of a jury will not be disturbed on account of improper evidence having been admitted, if the other evidence admitted was sufficient to justify it.—*Manchester et al. v. Doddridge*, 350
56. In a suit brought upon a note by the assignee of an administrator, a plea alleging that the right of the administrator to make the assignment had ceased before he made it, is a special plea of non-assignment, and must, under the R. S. 1843, be verified by oath.—*Thomas v. Reister, Administrator*, 359
57. When the general issue and a special plea are filed to the action, and the matter alleged in the special plea is admissible under the general issue, the defendant cannot complain that a demurrer to the special plea was improperly sustained. *Ibid.*
58. While the rule of practice in the Supreme Court was, that objections to evidence should be pointed out at the trial, or otherwise the overruling of them could not be assigned for error, objections were made to evidence without stating the grounds. *Held*, that the objections could not be noticed on error. *Ibid.*
59. The omission of a similiter to the general issue is immaterial after verdict.—*Templin v. Krahn*, 373
60. It is not material on error whether a deposition read by the plaintiff at the trial should have been suppressed or not, if the evidence was amply sufficient without it to sustain the suit.—*Billingsley v. The State Bank*, 375
61. Where land is about to be sold upon execution on a judgment which has ceased by lapse of time to be a lien thereon, the proper proceeding to prevent the sale is by motion on the law side of the Court to have the levy set aside.—*Stockwell et al. v. Walker et al.*, 384
62. A judgment rendered on a new trial will not be reversed because the new trial was granted upon insufficient grounds, if the adverse party has admitted before the Court below the truth of a material part of the evidence to admit which the new trial was granted.—*Houck v. Deitz*, 385
63. The fact that such admission was made

- to prevent a continuance, makes no difference. *Ibid.*
64. Where the evidence given at the trial is not in the record, it will be presumed that the judgment was in accordance with it. *Ibid.*
65. Objections to the competency of witnesses in a cause tried in 1842, must have been made at the trial or they will not be noticed by the Supreme Court.—*Zion et al. v. The State ex rel. Norris et al.*, 397
66. A plaintiff who has voluntarily abandoned his suit has no right to an appeal.—*The State Bank v. Hayes*, 400
67. A fact in issue, and which was necessary to have been proved to authorize the judgment of the Circuit Court, will be presumed to have been proved, if the record does not show the contrary.—*Halsey v. Matthews*, 404
68. The party, who by his pleading has tendered an immaterial issue, cannot have the judgment reversed because the case was tried on that issue, and the judgment was, therefore, not decisive of the merits.—*O'Neal v. Wade*, 410
69. A judgment of the Circuit Court will not be reversed for an erroneous ruling of the Court, when the party complaining has not been injured thereby.—*Alden et al. v. Barbour et al.*, 414
70. The setting aside of a special plea cannot be complained of when another remains under which the defense set up in the former plea could be proved in bar of the action.—*Wood v. Commons*, 418
71. A judgment will not be reversed because an erroneous instruction was given to the jury, if it could have done the party complaining no injury. *Ibid.*
72. Where the evidence is not contained in the record, the Court will presume that the facts proved were such as to authorize the judgment.—*Higman v. Brown*, 430
73. An objection to evidence given in a cause tried before the passage of the act of 1851 on the subject, will be held to have been properly overruled, if the ground of the objection does not appear in the record.—*Heuler v. Degant*, 501
74. Objections to instructions given to the jury will not be regarded, if the record does not show that the instructions were excepted to when they were given, or at any time before the jury gave their verdict. *Ibid.*
75. Where an instruction given to the jury is objected to, but the evidence given at the trial is not contained in the record, and it does not of itself appear to be objectionable, the verdict of the jury will not be set aside.—*Conklin v. The White Water Valley Canal Company*, 506
76. The rule that objections to evidence should be shown by the bill of exceptions, refers to cases in which the testimony has been admitted, and not to those in which it has been rejected.—*Gore v. Gore et al.*, 522
77. The refusal of the Circuit Court to give to the jury an instruction asked for, when the Court gave in its stead an equivalent one, is not a ground for reversing the judgment.—*Brown v. Brooks*, 518
78. It is not the duty of the Court to give irrelevant instructions to the jury.—*Hamilton v. The State*, 552
79. A plaintiff who has suffered a voluntary non-suit cannot afterward prosecute a writ of error for a refusal of the Court, upon his motion, to reinstate the cause.—*Wilson v. The Etna Insurance Company*, 557
80. If the minutes of evidence taken by counsel should be surreptitiously introduced into the jury-room by the procurement of his client or the connivance of a juror, and should be there read and used as a basis for arriving at a verdict, or should otherwise influence the finding of the jury, it would be good cause for setting aside the verdict and awarding a new trial; but where such minutes have got before the jury by accident and have not influenced their verdict, it will not be.—*Ball v. Carley*, 577
81. A person charged with the commission of a crime should be allowed a reasonable time to prepare his defense.—*Lindville v. The State*, 580

PRINCIPAL AND AGENT.

See NOTICE. REWARD 1.

1. A party employed merely to aid in making an arrest, has no implied authority to engage others, at his employer's expense, to assist.—*Pruitt v. Miller*, 16
2. A *bona fide* payment of a debt to an agent of the creditor authorized to receive it, is a payment to the creditor, even though the agent misappropriate the amount received in payment.—*Ward et al. v. McCoun*, 407

PRINCIPAL AND SURETY.

1. In an action against principal and surety upon a promissory note, evidence was adduced by the defendant, tending to show that, at the time appointed for the payment of the note, the principal offered to pay the same, and that the payee, without receiving the money or surrendering

- the note, made an oral agreement with the principal for a new loan of the money, upon the sole responsibility of the latter; but the Court instructed the jury that the evidence constituted no defense to the action. *Held*, that the instruction of the Court was erroneous.—*Musgrave et al. v. Glasgow*, 31
2. A surety, who has discharged a judgment rendered against him for a debt of his principal, by executing a note not negotiable by the law-merchant, and a mortgage, for the amount of the judgment, cannot sue his principal for money paid until he has paid the note and mortgage, or a part thereof.—*Bennett v. Buchanan*, 47
 3. To an action by the assignee against the makers of a promissory note, being principal and sureties, the defense was that, after the note became due, and before the assignment, the time of payment was extended by agreement between the principal and payee, without the consent or knowledge of the sureties. The only evidence of such extension was three indorsements made upon the note by the payee, after it became due, each a year apart from the other, to the effect that he had, at the date of the indorsements severally, received the interest for a year in advance, and the note was to stand, without suit, to the end of the year. *Held*, that it did not appear that the time of payment was extended by agreement made by the payee with the principal, nor that the interest might not have been paid by either or all of the makers.—*Cheek et al. v. Glass*, 286
 4. A valid agreement by a creditor with the principal debtor, without the consent of the surety, not to sue for a limited time after the debt is due, discharges the surety.—*Harbert v. Dumont et al.*, 346
 5. If a constable, having an execution in his hands against a judgment-debtor and his replevin-bail, levies upon sufficient goods of the debtor to satisfy the debt, and wastes the same, and afterward levies upon, and makes the money demanded out of, the property of the bail, the sureties of the constable will, under the R. S. 1843, be liable on his official bond to the bail.—*The State ex rel. McCullough v. Drury et al.*, 431
 6. The rule on this point is, that if the act done by the officer is performed under color of his office, his sureties are responsible. *Ibid.*
- by a Probate Court, within the sphere of its jurisdiction, cannot be impeached collaterally, except for fraud.—*Sherry v. Sansberry*, 320
2. The Probate Courts of this state possess general equity powers in relation to the administration and guardianship of estates.—*Powell, Adm'r, v. North et al.*, 392
 3. An order of the Probate Court to a guardian to invest money of his wards, without defining the amount, in the completion of an unfinished distillery, according to their interests therein, was held to justify a reasonably prudent expenditure for the purpose. *Ibid.*

PROCESS.

See ATTACHMENT, 1. PRACTICE, 24.

1. Process returnable at a day fixed by law, is deemed and taken to be returnable at such day, by enactment of the R. S. 1843, although a different day may be named in the process.—*The White Water Valley Canal Company v. Henderson*, 3
2. The sheriff's return to a subpoena in chancery showed that one of the defendants (naming him) had been "served," and that the others were "not found," &c. *Held*, that the language must be inferred to import that the service upon the defendant alleged to have been "served," was a personal one.—*Colerick et al. v. Hooper*, 316

PROMISSORY NOTES.

See PARTNERS, 2. PLEADING, 21, 27, 44, 45.
PRINCIPAL AND SURETY, 1, 2, 3.

1. Although a sealed note, given in part payment for certain real estate, be due before the time appointed for the execution of the deed, yet, if suit on the note be not commenced until after the time when the deed was to have been executed, the defendant may plead in bar of the action, that the plaintiff did not, on the day appointed by the contract, execute, or offer to execute, the deed.—*Gorham v. Reeves et al.*, 83
2. To a suit by the payees of a promissory note, given in consideration of the conveyance of certain land by them to the maker, and commenced after the time appointed by contract for the execution of the conveyance, it is a sufficient defense to show that at the time when the conveyance was, by contract, to have been executed, the plaintiffs were not the owners of the land. *Ibid.*
3. To a plea alleging such a defense, a replication that the plaintiffs, together with

PROBATE COURT.

See CLAIM AGAINST A DECEDENT'S ESTATE.

1. A direction or order given to a guardian

- their wives, were the owners in fee of the land mentioned in the plea, but not averring that they were the owners at the time when the conveyance was to have been executed, is bad. *Ibid.*
4. In a suit upon a promissory note by the assignee against the maker, the latter may plead, under the R. S. 1843, by way of set-off, an individual account which he had against any assignor prior to notice of the assignment.—*Sample v. Lamb*, 180
 5. Where the account against the assignor is larger than the amount of the note, the plaintiff cannot, by releasing the assignor from liability upon the assignment, render him a competent witness. *Ibid.*
 6. The notice of the protest for non-payment of a note payable at the branch at *Lawrenceburgh* of the state bank, stated that the note was presented, &c., "in the bank," for payment, &c. *Held*, that the words imported that the note was presented within banking hours.—*Henry v. The State Bank of Indiana*, 216
 7. The holder of a note payable at a chartered bank with this state, may, upon the note being protested for non-payment, notify all, or any part, of the indorsers of the fact, and render the indorsers thus notified liable for the payment of the note. *Ibid.*
 8. An indorser who has received due notice of the protest for non-payment of such a note, held by a bank, will not be discharged because a prior indorser was not thus notified, notwithstanding it was a usage of the bank to notify all indorsers of paper not paid at maturity, of protest. *Ibid.*
 9. In a suit upon the assignment of a promissory note, the assignor will not be held to be discharged by the *laches* of the assignee, if, upon a judgment obtained against the maker in due time, the issuing of an execution was only delayed until a reasonable time had elapsed after the adjournment of the Court at which judgment was rendered; unless some special cause is shown which made it the duty of the assignee, as an act of good faith, to have it issued earlier.—*Spears v. Clark*, 296
 10. In a suit upon the assignment of a promissory note, the evidence was that the term of the Court at which the plaintiff obtained judgment against the maker was adjourned on the 7th of *September*, and that a *fi. fa.* issued on the judgment on the 21st of that month. *Held*, in the absence of proof of any loss by the delay, that the plaintiff exercised sufficient diligence in taking out execution. *Ibid.*
 11. A promissory note was dated at *Lafayette*, but the assignments on it were not dated as of any place. Suit was prosecuted and judgment obtained against the makers at that place. Suit was also commenced against the defendant, one of the assignors, and process served on him at that place. There was also proof that several of the parties resided there. *Held*, that the averment in the declaration on the assignment of the note, that it was assigned at *Lafayette*, was presumptively established. *Ibid.*
 12. Where, in a suit by the assignee against the assignor of a promissory note, the former shows that he has used due diligence in prosecuting the maker to insolvency, it is not incumbent on the plaintiff to prove that the maker continued insolvent till the commencement of the suit. *Ibid.*
 13. A note, the assignment of which was sued on, was signed as follows: *S. T.; T. and S.* The declaration averred that *S. T.*, and *T.* of the firm of *T. and S.*, were the same person. The record of a suit by the assignee against *T.* and *S.* on the note, alleging that they were the persons who made the note, was in evidence at the trial, and *T.* having been examined as a witness, spoke, in his testimony, of *S.* and himself, the defendants in the judgment, as the makers of the note, and mentioned no other person. *Held*, that the averment was sufficiently proved. *Ibid.*
 14. In a suit by the payee against the makers of a note, the latter will not be allowed to show, by parol evidence, that a guaranty indorsed upon the note was, at the time it was made, accepted by the payee in full satisfaction of the note.—*Smith et al. v. Stevens*, 332
 15. Where a note has been surrendered by the payee to one of the makers with an intention of canceling it, a delivery of the note by such maker to the payee's administrator, upon his demand, in ignorance of the makers' rights, will not revive the debt.—*Sherman et al. v. Sherman*, 337
 16. The surrender of a note by the payee to the maker, is *prima facie* a satisfaction or release of the debt. *Ibid.*
 17. In a suit upon a promissory note, a guarantor of the solvency of the maker is not a competent witness to prove that the note was executed without a consideration.—*Hanna v. Spencer*, 351
 18. The administrator of the legal holder of a note, has the right to assign it.—*Thomas v. Reister, Administrator*, 369

19. A promissory note was made payable to A., his agent or attorney. *Held*, that while unnegotiated, suit could only be brought upon the note in the name of A.—*Templin v. Krahn*, 373
20. A promissory note, which had not been negotiated, was lost, and nothing had been heard of its existence, although four years had elapsed from the time when it became due. At the end of the four years, suit was brought upon it—the declaration alleging the loss, &c. *Held*, that the suit would lie. *Ibid.*
21. In debt by the payee to recover the amount of a lost note, the plaintiff proved by a witness that a note of the maker, dated on or about the date of the note described in the declaration, and otherwise corresponding with it, had been left with him to collect the interest; that he had made diligent search for the note and could not find it; and that neither the payee nor any other person ever got the note, to his knowledge, out of his possession. *Held*, that the evidence was sufficient to authorize a judgment for the plaintiff. *Ibid.*
22. Where notes are given to secure the purchase-money of land, payable respectively on or before a given day, under a contract that a deed is to be executed for the land on the payment of the notes, a suit cannot be maintained on either of the notes after the last has become due, unless a deed was tendered on or before the day when the last note matured.—*Malaby et ux. v. Kuss*, 388
23. A promissory note not payable at a chartered bank, is not, in this state, governed by the law-merchant.—*Blount v. Riley*, 471
24. Where a promissory note, whether negotiable by the law-merchant or not, has been assigned after it became due, the admissions of the assignor made before the assignment that the note had been paid, are admissible in evidence against the assignee. *Ibid.*
25. A note was executed to G., agent of Wells county, or his successor in office, &c. *Held*, that G.'s successor could not sue upon the note.—*Upton v. Starr*, 508
26. To a suit brought upon a promissory note given to a county agent, the defendant set up in bar of payment that it was given for a part of the purchase-money of a county-seat lot; that the agent sold the lot to the defendant for 100 dollars, of which sum he paid, at the time, 40 dollars, and executed his notes, that in suit being one, for the remaining 60 dollars; that said agent kept the 40 dollars, re-
- ported the sale to the county commissioners as having been made at 60 dollars, which report was accepted; and that the defendant had already paid with the said 40 dollars the amount of 60 dollars, at which sum the lot was reported as having been sold. *Held*, that these facts were no defense against the note. *Ibid.*
27. Debt by *The State* on the relation of S., the clerk of the *Carroll* Circuit Court upon a sealed note made payable to W. C., school commissioner, or to his successor in office, and given to secure a loan of funds belonging to congressional township No. 26, &c., in *Carroll* county. By an act of 1844 the office of auditor in said county was abolished and its duties transferred to the clerk of the *Carroll* Circuit Court. By an act of 1849 the office of school commissioner was abolished and its duties transferred to the auditor and treasurer. *Held*, that by the act of 1844 the clerk of the *Carroll* Circuit Court became *ex officio* the auditor of said county, and it was his duty to bring the present suit; but, *held*, that, under the R. S. 1843, it should have been brought in the name of the payee of the note.—*Bowman et al. v. The State ex rel. Stewart*, 524
28. The assignee of a note, in order to exercise the diligence in collecting it of the maker which is requisite in collecting a note not payable in bank, need not sue to recover a part of the note which is usurious.—*Johnson v. Blake*, 542
29. The fact that the assignee knew when he received the assignment that such part was usurious makes no difference. *Ibid.*
30. Where a woman, being the payee and holder of a sealed note, marries, the property of the note is in the husband, and he alone, and not the wife, can negotiate and pass it by indorsement.—*Boss v. Secret et al.*, 545
31. When the assignment of the note is signed by the husband, the wife's signature to the assignment is mere surplusage. *Ibid.*

PROTEST.

See *BILLS OF EXCHANGE*, 3, 5, 8, 9, 13. *PROMISSORY NOTES*, 6, 7, 8.

PURCHASE-MONEY.

If one of several instalments of purchase-money for land, be payable before the deed is to be made, it is no defense to a suit brought by the payee to recover such instalment, before the time appointed for the execution of the deed, that the payee had no title to the land at the time when

the contract of sale was made.—*Wright v. Blachley et al.*, 101

QUO WARRANTO.

See CORPORATION, 7.

RAILROADS.

See INJUNCTION, 8. NEWCASTLE AND RICHMOND RAILROAD COMPANY. PERU AND INDIANAPOLIS RAILROAD COMPANY.

1. Where a company is authorized by an act of the legislature to construct a railroad between two designated points, they have a right to occupy, in the construction of the road, any land of the state between those points, on the general route authorized, which may be necessary for the purpose.—*The Indiana Central Railway Company v. The State of Indiana et al.*, 421
2. When the legislature authorizes the construction of a railroad between two designated points, no intermediate point being named, and there are routes between said points equally feasible, that which is most direct will be deemed to have been contemplated; but where there is a difference in the feasibility of the routes, a reasonable discretion must be allowed in the selection of that to be followed.—*The Newcastle and Richmond Railroad Company v. The Peru and Indianapolis Railroad Company*, 464

RECEIPT.

See EVIDENCE, 10.

RECOGNIZANCE.

1. A. B. recovered a judgment in the *Lagrange* Circuit Court against C. D., and in the vacation of the Court immediately following, one E. F. acknowledged himself replevin-bail for the stay of execution thereon, as follows: "A. B. v. C. D.—Comes now E. F. and acknowledges himself replevin-bail and security for the payment of the above judgment, at the expiration of the time allowed by law for the stay of execution. (Signed) E. F." This entry was entitled in the same manner as the judgment, but several entries intervened on the order-book between it and the entry of judgment. E. F., over five years after he had executed the recognizance, moved to set it aside as void. *Held*, that the recognizance was, substantially, in the form required by the statute. *Held*, also, that after the lapse of time mentioned, the circumstance that the recognizance was not written immediately under the entry of the judgment, furnish-

ed no sufficient ground for setting it aside.—*Williams v. Beisel*, 118

2. A recognizance taken by the sheriff for the appearance of a person indicted, to answer the accusation, is not void, under the R. S. 1843, from the circumstance, alone, that the amount of bail required was not indorsed on the process.—*Trimble v. The State*, 151

RECORD.

See EVIDENCE, 22. PRACTICE, 7.

RECOUPMENT.

See CONTRACT, 3, 4, 5, 8, 13, 14, 15, 21.

REFEREES.

In a suit upon the official bond of a school commissioner, after an interlocutory judgment for the plaintiff, the inquiry of damages was submitted, by agreement of the parties, to referees. *Held*, that the submission was authorized by the R. S. 1843. *Kintner et al. v. The State ex rel. Skelton*, 86

REMEDY.

1. If A., for a good consideration, promises B. to pay him a debt due from C. to B., the remedy for a breach of the undertaking is at law and not in chancery.—*Eastman v. Ramsey*, 419
2. Section 121 of the general road law of 1849, which provides a remedy by action of debt at the suit of the supervisor for the obstructing of a public highway, does not take away the remedy by indictment authorized by s. 65, c. 53, R. S. 1843, for the same offense, but furnishes a cumulative remedy.—*The State v. Virt*, 447

REPLEVIN.

See PLEADING, 15. WITNESS, 5.

1. In replevin, damages cannot be assessed beyond the amount claimed in the declaration.—*O'Neal v. Wade*, 410
2. In replevin, in a justice's Court, the value of the property as specified in the declaration, and not in the affidavit, governs as to the jurisdiction of the Court.—*Markin v. Jernigan*, 548
3. The declaration in replevin before a justice of the peace contained two counts, and the property specified in each count was alleged to be of the value of 40 dollars. *Held*, that the justice had no jurisdiction of the case. *Ibid.*

REPLEVIN-BAIL.

See CHANCERY, 23. CONTRACT, 12. RECOGNIZANCE, 1.

1. The revival of a judgment against the principal, by a *scire facias* issued against him alone, does not release the replevin-bail.—*Stockwell et al. v. Walker et al.*, 215
2. By the R. S. 1843, a joint execution issues upon a justice's judgment against the judgment-debtor and the replevin-bail, but it is the duty of the justice to make an indorsement thereon designating which of the defendants is principal and which the bail, and of the constable first to sell so much of the goods and chattels of the principal as he can find before he sells any of the goods and chattels of the bail, unless he is otherwise directed by the bail.—*The State ex rel. McCullough v. Drury et al.* 433
3. A suit will lie upon a constable's bond on behalf of a replevin-bail against the sureties of the constable for his illegal refusal to levy an execution upon the goods and chattels of a judgment-debtor subject to execution, whereby, the debtor's property having been wasted, the bail was compelled to pay the debt. *Ibid.*
4. In such a suit it will be presumed, in the absence of contrary evidence, that the execution issued to the constable was a legal one, and properly indorsed. *Ibid.*
5. If a constable, having an execution in his hands against a judgment-debtor and his replevin-bail, levies upon sufficient goods of the debtor to satisfy the debt, and wastes the same, and afterward levies upon, and makes the money demanded out of, the property of the bail, the sureties of the constable will, under the R. S. 1843, be liable on his official bond to the bail. *Ibid.*
6. The rule on this point is, that if the act done by the officer is performed under color of his office, his sureties are responsible. *Ibid.*
7. To sustain a set-off for money paid as a replevin-bail, proof must be made of the entry of replevin-bail.—*Walker, Executor, v. Clymer*, 525

REPLEVIN-BOND.

See PLEADING, 35.

RESCISSION.

See CHANCERY, 13, 14.

RES GESTÆ.

See EVIDENCE, 20.

RETURN, SHERIFF'S.

See PROCESS, 2.

A sheriff's return that he has executed a deed of land to a bidder, does not conclude the latter from showing the contrary.—*Gregg v. Strange*, 366

REVIVOR.

See SCIRE FACIAS, 5. PRACTICE, 36.

REWARD.

1. A reward was offered, by Franklin county, for the apprehension and delivery to the sheriff of said county, of one *E.*, who was charged with the crime of murder. One *M.* thereupon went to New Orleans in pursuit of *E.*, and arrested him and brought him back to the vicinity of said county. Here, by the negligence of *M.*, *E.* escaped. On the morning afterward, *M.*, with others in his employ, watched a house where *E.* was supposed to be secreted, but did not find him. On the next morning, *M.* called on one *P.*, related to him the circumstances of his journey, his expenses, the arrest of *E.* and his escape, and requested the aid of *P.* to re-take *E.*, and promised *P.* to compensate him if he, *P.*, should arrest him. *P.* agreed to watch at said house for *E.*, take him if he should come there, and give *M.* notice of the arrest. *P.* said *M.* ought to have the reward. Meanwhile, *M.* continued his search for *E.* in the vicinity. *P.* arrested *E.* at said house, on the day after the conversation with *M.*, concealed from *M.* the fact, delivered *E.* to the sheriff of said county, and obtained the reward. In *assumpsit* by *M.* against *P.* to recover the reward, *held*, that *P.* was merely the servant of *M.* to make the arrest, and that the latter was entitled to the reward. *Held*, also, that no demand of the reward from *P.* was necessary before suit.—*Bennett v. Miller*, 16
2. No plea of set-off, or notice of set-off, was filed in this cause. *Held*, that it would not have been competent, therefore, for the jury to have allowed *P.* compensation for making the arrest. *Ibid.*

ROADS.

See HIGHWAY.

S.

SALE.

See ADMINISTRATOR'S SALE. EVIDENCE, 16. GOODS SOLD AND DELIVERED. LEASE, 4. TRUSTEE, 2.

1. A debtor agreed to give his creditor a

lien on personal property sold by the latter to him, and set it apart for the purpose of vesting in him possession, and gave him power to sell the property upon the non-payment of the debt. The purchase-money not being paid, the creditor proceeded to sell the property at public sale, according to the agreement, but the debtor purposely kept the property concealed and locked up from view. *Held*, that the sale was not rendered void by the property being thus kept out of view. *Held*, also, that the debtor could not complain of the inadequacy of the price caused by such concealment of the property.—*Huff, Administrator, v. Earl*, 306

2. If a debtor, who has set apart to his creditor specific property, and empowered him to sell it to satisfy the debt, mixes other property with it, without the consent or knowledge of the creditor, so that it cannot be distinguished, he will not be permitted to derive advantage from the act. *Ibid.*

SATISFACTION.

See ATTORNEY AT LAW, 3. JUDGMENT, 5, 7. PROMISSORY NOTES, 16.

SCIRE FACIAS.

See REPLEVIN-BAIL, 1.

1. A writ of *scire facias* to revive a judgment stated the time of the rendition of the judgment, that execution remained to be done, and commanded the sheriff to summon the defendant to answer why the plaintiffs should not have execution. *Held*, that the writ averred, substantially, that the judgment remained unsatisfied.—*Davidson et al. v. Alford et al.*, 1
2. Where the Circuit Court before which, and the time at which, a party is summoned to appear, are specified in the writ, he cannot object that the place where the Court was to be held was not sufficiently indicated. *Ibid.*
3. The suggestion of the death of one of two defendants to a *scire facias* to revive a judgment, is equivalent to a dismissal as to such defendant. *Ibid.*
4. A writ of *scire facias* to revive a judgment may be amended, under the R. S. 1843, at any time before judgment, by striking out the name of one of several defendants. *Ibid.*
5. The R. S. 1843 authorize the issuing of a *scire facias* to revive a judgment against the personal representatives of a deceased defendant. *Ibid.*

SEALED NOTE.

See PROMISSORY NOTES, 1.

SET-OFF.

See PLEADING, 5, 32. REPLEVIN-BAIL, 7. REWARD, 2.

1. In a suit upon a promissory note by the assignee against the maker, the latter may plead, under the R. S. 1843, by way of set-off, an individual account which he had against any assignor prior to notice of the assignment.—*Sample v. Lamb*, 180
2. In a suit by the assignee of a note against the maker, the latter may plead and prove that the plaintiff holds the note merely as a trustee of the payee, in order to let in as a set-off an indebtedness of the maker to the defendant.—*Henry v. Scott*, 412

SHERIFF'S SALE.

See EJECTMENT, 2. PRACTICE, 61.

1. Where land has been appraised and sold at sheriff's sale subject to alleged incumbrances which had actually been discharged before the purchase, the purchaser cannot be compelled to take the land at the sum of the price bid and the amount of such supposed incumbrances.—*Gregg v. Strange*, 366
2. A sheriff's return that he has executed a deed of land to a bidder, does not conclude the latter from showing the contrary. *Ibid.*

SIMILITER.

The omission of a similiter to the general issue is immaterial after verdict.—*Templin v. Krahn*, 373

SINKING FUND.

See CHANCERY, 7.

SLANDER.

1. In a count in slander, the words alleged to have been spoken by the defendant, were as follows: "*Sarah Jane*" (meaning the plaintiff,) "told me" (meaning the defendant,) "that her brothers" (meaning certain brothers therein before mentioned) "had" (using obscene words importing carnal intercourse) "with her; thereby then and there meaning and charging that the said plaintiff had then and there confessed to him, the said defendant, that she had been and was guilty of sexual and incestuous intercourse with her brothers," &c. *Held*, that the words, with the accompanying averments, imputed

- fornication, and, as they were alleged to have been spoken of a female, were actionable, under the statute.—*Abshire v. Cline*, 115
2. To a count in slander charging the defendant with the speaking of words imputing to the plaintiff the crime of incest with her brothers, the defendant pleaded "that the plaintiff did, on," &c., "at," &c., "tell the defendant that her said brothers had had sexual and illicit intercourse with her," &c. *Held*, that a demurrer to the plea was properly sustained. *Ibid*.
 3. To the Count last named, the defendant pleaded, in justification of the words spoken, that the plaintiff had been guilty of incestuous intercourse with her said brothers, before the speaking and publishing of the words, &c., and the Court, upon the trial, refused to admit evidence that the plaintiff had been guilty of such sexual intercourse. *Held*, that the evidence was improperly excluded. *Ibid*.
 4. In an action of slander, the defendant cannot prove, under the general issue, the truth of the words laid in the declaration in order to rebut the inference of malice. *Ibid*.
 5. In an action of slander, where there is ambiguity in the words laid in the declaration in regard to the person slandered, there must be an introductory averment showing that the plaintiff was the person aimed at.—*Harper v. Delp*, 225
 6. To say of a man that he was seen ravishing a cow, imports that he was seen committing the crime of bestiality and buggery with the cow. *Ibid*.
 7. In the declaration in the present case, words alleged to have been spoken of the plaintiff were, that he had been seen a foul of a cow. *Held*, that they did not warrant an innuendo that he was guilty of bestiality. *Held*, also, that if the defendant had been in the practice, by the words laid, of imputing the crime of bestiality, or, if he had used them on the occasion alleged in that sense, and they were so understood by the hearers, there should have been a special averment to that effect. *Ibid*.
 8. Words charged to have been spoken by the defendant, were alleged in the declaration as follows: *R*. (meaning, &c.) saw a young man (meaning the plaintiff) ravishing a cow. My son *R*. (meaning, &c.) on his way home to his father's, between *S*'s shop and his father's, saw a man ravishing a cow, (meaning the plaintiff, &c.) *Held*, that the words did not show, with sufficient certainty, that the plaintiff was the person whom the defendant intended to slander. *Ibid*.
 9. The following words were alleged in the declaration to have been spoken by the defendant: *R*. (meaning, &c.) saw him (meaning the plaintiff) ravishing, &c. *Held*, that the word *him* sufficiently demonstrated the person of the plaintiff. *Held*, also, that a formal *colloquium* stating that the words were spoken in a conversation of and concerning the plaintiff, was unnecessary. *Ibid*.
 10. The defendant in slander having offered in evidence the deposition of a witness tending to sustain a plea in justification of the speaking of a part of the words laid in the declaration, the plaintiff objected to the deposition—stating that those words were not relied upon by him. The Court sustained the objection, directing the jury to disregard those words; and in their charges instructed the jury that those words being withdrawn, were not to be considered by them. *Held*, that the rejecting of the deposition did not injure the defendant.—*Hesler v. Degant*, 501
 11. In slander for words spoken of the plaintiff in his trade, if the words proved assume that, when they were spoken, the plaintiff was carrying on such trade, there is no need of proving that fact. *Ibid*.
 12. Evidence of actionable words spoken by the defendant of the plaintiff after the commencement of the suit, is admissible, in slander, to show the motive with which the words were spoken for which the suit was brought. *Ibid*.
 13. In an action of slander the Court instructed the jury, in effect, that if the words charged were spoken under excitement, and afterward taken back, that fact should be considered in mitigation of damages; but if they were thus spoken and afterward persisted in, it should not be so considered. The Court afterward added, that if the charge was made under excitement it might be considered in mitigation. *Held*, that the instruction, thus modified, could not be complained of by the defendant.—*Brown v. Brooks*, 518
- SON-IN-LAW.
- A son-in-law, living with the parents of his wife, cannot recover for occasional services performed in that capacity, without proof of an express contract that they were to be paid for.—*Oxford, Administrator, v. McFarland*, 156
- SPECIFIC ARTICLES, CONTRACT TO
PAY IN.
- See VENDOR AND PURCHASER, 15.

SPECIFIC PERFORMANCE.

See PARTIES, 1. VENDOR AND PURCHASER, 14, 15.

1. Where it is a part of the contract for the future conveyance of land, that the vendee shall labor for a specific period for the vendor, the vendee cannot entitle himself to the conveyance by tendering a sum of money after the time fixed for the execution of the deed, as an equivalent for the non-performance of the labor; at least, unless the performance of it was prevented by the vendor.—*Brewer v. Thorp*, 262
2. Where a written instrument contains all the facts of a contract, except such as may be proved by parol, it is sufficiently certain to be enforced.—*Colerick et al. v. Hooper*, 316
3. The language of an agreement was as follows: I have this day sold my lot to A. B. on the plat in the town of South Bend—on the plat of said town on the river bank. I have received value and will make the deed as soon as convenient. August 11, 1835. (Signed) C. D. Held, that parol evidence was admissible to identify the particular lot intended to be conveyed, and that the contract was, therefore, sufficiently certain to be the foundation of a bill for specific performance. *Ibid.*

STATE BANK OF INDIANA.

See USURY, 2.

The capital stock of the *State Bank of Indiana*, situate within the limits of the city of *Madison*, is not, nor is any part of it, subject to a tax for city purposes, imposed by the authorities of said city.—*The State Bank v. The City of Madison*, 43

STATE BOARD OF EQUALIZATION.

1. By the statute of 1852, the members of the state board of equalization were appointed to discharge a public duty, and there being no provision that a less number than the whole should proceed in the business, the district delegates and the state auditor who convened at *Indianapolis* as such board, had no authority to act in the absence of the delegate from the sixth district.—*Hamilton, Auditor of Marion County, v. The State ex rel. Bates*, 452
2. Were the order of said board increasing the appraisement of land in *Marion* county otherwise valid, it would be null and void, because it was made in the absence of one of the members of the board. *Ibid.*

3. Said board is a mere creature of the statute, and has no authority except what the statute confers; and the board being only authorized by the statute to equalize the appraisement of land between the several congressional districts, the order of the board for equalizing the appraisement between the several counties of the sixth congressional district, had the board been legally convened, would have been null and void on that account. *Ibid.*

STATUTE OF FRAUDS.

See EXECUTORS AND ADMINISTRATORS, 1. GOODS SOLD AND DELIVERED.

1. Where A. owes B. and B. owes C., in order to render A. liable to C. for B.'s debt, without a promise in writing, a mutual agreement of the parties must be proved that B. was to be released and A. was to pay B.'s debt to C.—*Decker v. Shaffer*, 187
2. An oral agreement, even for a valuable consideration, to answer for the debt of another, is void by the statute of frauds.—*Smith et al. v. Stevens*, 332

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

STEAM-BOAT.

See ATTACHMENT, 3, 4, 5, 6.

SUBSCRIPTIONS, STOCK.

See CORPORATION, 7.

T.

TAXES.

See EXTORTION. NEW ALBANY, CITY OF. STATE BANK OF INDIANA.

The situs of personal property, for the purposes of taxation, does not follow the domicile of the owner.—*The City of New Albany v. Meekin*, 481

TENANCY AT WILL.

See LANDLORD AND TENANT.

TENDER.

See PROMISSORY NOTES, 1. SPECIFIC PERFORMANCE, 1.

TITLE-BOND.

Where a title-bond for the conveyance of land is silent as to the time when the obligee is to have possession, the latter is not entitled to the possession before the time of receiving his deed.—*Wright v. Blackley et al.*, 101

TREASURER, COUNTY.

See EXTORTION.

TRESPASS.

See DELIVERY BOND, 1. JUSTICE OF THE PEACE, 6. LAFAYETTE, TOWN OF.

1. A person who owns the reversion or remainder in land, if there is a suit pending between him and another involving a question of waste or improvements, has a right to go upon the premises in a peaceable manner with witnesses, for the purpose of examining the same.—*Conwell et al. v. The State*, 387
2. In trespass *quare clausum fregit*, where the unlawful breaking into the plaintiff's close is established, it is not material to his right to recover, whether the matter of aggravation alleged is proved or not.—*Halsey v. Matthews*, 404

TRIAL BY JURY.

An attorney at law against whom charges have been preferred under the statute for mal-conduct in office, is not entitled to have the charges tried by a jury.—*Ex parte Robinson*, 52

TROVER.

See WITNESS, 5.

TRUST.

See FRAUDULENT CONVEYANCE, 2. VENDOR AND PURCHASER, 10, 11, 12.

1. If a father purchases land with his own money, and by way of advancement to his daughter takes the deed in her husband's name, no resulting trust arises in favor of the father.—*Baker v. Leathers et al.*, 558
2. A resulting trust may be established by the parol declarations of the person to whom the conveyance is made. *Ibid.*
3. Such evidence is, however, most unsatisfactory, on account of the facility with which it may be fabricated, the impossibility of contradiction, and the consequences which the slightest mistake or failure of memory may produce; yet if it is plain, consistent, and, especially, if corroborated by circumstances, it is competent ground for a decree. *Ibid.*

TRUSTEE.

See HUSBAND AND WIFE, 3.

1. The giving of the power by a debtor to his creditor to sell property for the payment of his debt, does not make him a trustee of the debtor.—*Huff, Administrator, v. Earl*, 306

2. The purchase by a trustee, at his own sale, of the property of the *cestui que trust*, is not absolutely void. The purchase will be for the benefit of the *cestui que trust*, if the latter desires to avail himself of it; but if the *cestui que trust* chooses to confirm the purchase, or even to hold the trustee to it against his wishes, he may do so. *Ibid.*

U.

USURY.

See BILLS OF EXCHANGE, 2. INTEREST, 2, 3, 4, 5. PROMISSORY NOTES, 28, 29.

1. The receipt of usurious interest, while the statute of 1845 enacting that usurious interest paid should not be recovered back was in force, was a benefit to the recipient and a valid consideration for an agreement to extend the time for the payment of a note.—*Harbert v. Demont et al.*, 346
2. The statute of 1843, which declares usurious contracts valid as to the principal debt, applies as well to loans made by the state bank as to those made by individuals.—*Billingsley v. The State Bank*, 375

V.

VARIANCE.

See BILLS OF EXCHANGE, 10, 12.

VENDOR AND PURCHASER.

See ACKNOWLEDGMENT, CHANCERY, 5. CONVEYANCE, DOWER, 6. FRAUDULENT CONVEYANCE, GUARDIAN AND WARD, 3, 4. LANDLORD AND TENANT, 1. LEASE, 4. RETURN, SHERIFF'S.

1. Although a sealed note, given in part payment for certain real estate, be due before the time appointed for the execution of the deed, yet, if suit on the note be not commenced until after the time when the deed was to have been executed, the defendant may plead in bar of the action, that the plaintiff did not, on the day appointed by the contract, execute, or offer to execute, the deed.—*Gorham v. Reeves et al.*, 83
2. To a suit by the payees of a promissory note, given in consideration of the conveyance of certain land by them to the maker, and commenced after the time appointed by contract for the execution of the conveyance, it is a sufficient defense to show that at the time when, &c., the conveyance was, by contract, to have been executed, the plaintiffs were not the owners of the land. *Ibid.*

3. To a plea alleging such a defense, a replication that the plaintiffs, together with their wives, were the owners in fee of the land mentioned in the plea, but not averring that they were the owners at the time when the conveyance was to have been executed, is bad. *Ibid.*
4. A conveyance of land by father to son, without a valuable consideration, and for the purpose of defrauding existing creditors, is void as against such creditors, but valid between the parties; and, where the lands have descended to the heirs of the grantee, a Court of chancery will, upon the application of such creditors, set aside the sale as to them, and order the land to be sold to pay their claims and costs; and the heirs of the grantee will be entitled to the surplus.—*Burtch et al. v. Elliott*, 99
5. If one of several instalments of purchase-money for land, be payable before the deed is to be made, it is no defense to a suit brought by the payee to recover such instalment, before the time appointed for the execution of the deed, that the payee had no title to the land at the time when the contract of sale was made.—*Wright v. Blachley et al.*, 101
6. Where a title-bond for the conveyance of land is silent as to the time when the obligee is to have possession, the latter is not entitled to the possession before the time of receiving his deed. *Ibid.*
7. An administrator's sale of real estate for the payment of debts, made by an order of the Probate Court, is not void from the circumstance that the record does not disclose that notice of the application to sell was given to the heirs.—*Doe d. Harkrider et al. v. Harvey*, 104
8. Notice in that case will be presumed. *Ibid.*
9. A sale of land by an administrator for the payment of debts, will not be set aside, at law, because the administrator himself became the purchaser. *Ibid.*
10. If the party who has paid the consideration for land and is entitled to a deed, has the land conveyed for his use to another, the latter holds the land simply in trust for the former, and it is liable to execution, under the R. S. 1843, upon any judgment against the person for whose use it is held.—*Tavis et al. v. Doe*, 129
11. Where a judgment-debtor colludes with a third person and procures land to be conveyed to the latter to defraud judgment-creditors, the land is liable, under the R. S. 1843, to execution, upon the judgment. *Ibid.*
12. A son being the owner of the undivided half of a tract of land, purchased for his father the other half, the latter furnishing the means, but took the deed in his own name; it being understood that the father would, in a short time, remove from Ohio to the land, when they would divide the tract to suit them. The father did remove to the land, the division was made, and the father took possession of his half; but no deed was executed to him. Afterward, the son having paid certain money for the father, it was agreed between them in writing, in consideration thereof, that the title to the father's share of the land should remain in the son, and that the father and his wife should have the privilege of occupying the same during their lives. *Held*, that the trust-estate of the father was extinguished by the execution of the said writing.—*Owings et al. v. Owings*, 142
13. Where it is a part of the contract for the future conveyance of land, that the vendee shall labor for a specific period for the vendor, the vendee cannot entitle himself to the conveyance by tendering a sum of money, after the time fixed for the execution of the deed, as an equivalent for the non-performance of the labor; at least, unless the performance of it was prevented by the vendor.—*Breuer v. Thorp*, 262
14. A purchaser of land, whose deed is to be made upon the payment of several notes given for the purchase-money, cannot maintain a bill, filed after all the notes have become due, to enforce the execution of the deed, without showing a payment of all the notes, or a proper offer to pay them, or something equivalent.—*West v. Chase*, 301
15. A. contracted with B. to sell to him a lot in Elkhart county, for a certain sum in potter's ware, for the payment of which sum five notes were given. The contract was made in said county, where B. resided; but A. then, and when this suit was brought, resided in Illinois. The first three notes were paid to A. when they became due. When the last two severally became due, B. set apart at his manufactory, in said county, where he carried on the business of manufacturing potter's ware, a sufficient quantity of potter's ware to pay them. He, afterward, filed his bill to compel A. to execute to him a deed, but did not aver or prove a demand of the deed. *Held*, that by setting apart the potter's ware as stated, it became the property of A., and the notes were thereby paid. *Held*, also, that A.'s absence from the state was a sufficient excuse for B.'s not demanding a deed, had the demand been otherwise necessary. *Ibid.*

16. The purchase by a trustee, at his own sale, of the property of the *cestui que trust*, is not absolutely void. The purchase will be for the benefit of the *cestui que trust*, if the latter desires to avail himself of it; but if the *cestui que trust* chooses to confirm the purchase, or even to hold the trustee to it against his wishes, he may do so.—*Huff, Administrator, v. Earl et al.*, 306
17. Where, at the time of making a contract for the sale of land, the vendor has fraudulently misrepresented the quantity, a Court of equity, upon the application of the vendee, will rescind the contract.—*Yost v. Shaffer*, 331
18. Such vendor cannot, by afterward purchasing and tendering to the vendee a conveyance for an adjoining quantity sufficient to make up the deficiency, deprive the latter of the right to rescind the contract. *Ibid.*
19. Where land has been appraised and sold at sheriff's sale subject to alleged incumbrances which had actually been discharged before the purchase, the purchaser cannot be compelled to take the land at the sum of the price bid and the amount of such supposed incumbrances.—*Gregg v. Strange*, 366
20. Where notes are given to secure the purchase-money of land, under a contract that a deed is to be executed for the land on the payment of the notes, a suit cannot be maintained on either of the notes after the last has become due, unless a deed was tendered on or before the day when the last note matured.—*Malaby et ux. v. Kuns*, 388
21. A. conveyed to B. a tract of land by deed of warranty. At the time of B.'s purchase, there was a school-house on a part of the premises then occupied by a school; B. was also informed that the ground on which the school-house stood was held by the school-district under a conveyance from the owner of the land, but that there was a question about the validity of the conveyance. *Held*, that B. was not entitled to any deduction from the purchase-money, by way of damages, on account of the location of the school-house on the premises.—*Dodds v. Toner*, 427
22. The 6th article of the treaty made by the *United States* on the 6th of October, 1818, with the *Miami* nation of *Indians*, provided that the several tracts of land which the *United States* therein engaged to grant should never be transferred by the grantees or their heirs without the approbation of the president of the *United States*. Pursuant to the treaty, certain premises were granted to B., an *Indian* woman, and afterward the president, upon her petition, gave his approval to her selling a part of the land and to the division of the rest among her children. She did accordingly sell a part of the land, but shortly afterward died without having made any partition of the residue to her children. *Held*, that the children took the land by descent, and could not, therefore, convey it, and that a deed of conveyance from them was not voidable merely, but void.—*Harris et al. v. Doe d. Spencer*, 494
23. A sale to an execution-plaintiff will be avoided by the reversal of the judgment as respects the costs of the suit.—*Hutchens v. Doe d. Smith*, 528

VENIRE.

See PRACTICE, 24.

VENUE, CHANGE OF.

See JURISDICTION. PRACTICE, 42.

VERDICT.

See PRACTICE, 18, 21, 23, 25, 80.

1. The verdict of a jury will not be set aside by the Supreme Court as being contrary to the evidence, unless it is plainly so.—*French v. Green*, 267
2. The verdict of a jury will not be disturbed on account of improper evidence having been admitted, if the other evidence admitted was sufficient to justify it.—*Manchester et al. v. Doddridge*, 360
3. Where the verdict is right, according to the evidence, it will not be examined whether the instructions given to the jury were correct. *Ibid.*
4. A verdict will not be set aside on error on account of erroneous instructions given to the jury, if it is apparent from the evidence that the verdict, notwithstanding, was right.—*Billingley v. The State Bank*, 375
5. Where a verdict against a party would still have been right, although evidence offered by him and rejected had been admitted, he cannot complain of the rejection of the evidence. *Ibid.*
6. Upon the trial of an indictment for murder in the first degree, the jury found a verdict as follows: "We, the jury, find the defendant guilty of manslaughter, and sentence him to imprisonment in the state prison for three years at hard labor." *Held*, that the verdict was not defective in omitting to specify that the defendant

was found guilty "as charged in the indictment."—*Moon v. The State*, 438

W.

WARRANTY.

See PRACTICE, 23.

WHITE WATER VALLEY CANAL COMPANY.

See AWARD, 3, 4. EVIDENCE, 1.

WILL.

See CONDITION SUBSEQUENT.

1. A testator disposed of his estate by will, as follows: "I, J. R. do make and publish this my last will and testament in manner and form following, that is to say, after all my just debts are paid, I give and bequeath to my wife, Ann, a certain grey mare, &c., as also all my real and personal estate during her natural life, provided she should not marry, and, at her death, to be equally divided between my brothers and sisters. But, in case she should marry, then the one-half of my estate to be divided equally between my brothers and sisters, or their heirs; and the other half I bequeath to my said wife," &c. Held, that upon her subsequent marriage, she took an estate in fee in the testator's real property.—*Doe d. Rush v. Kinney et al.*, 50
2. Where a will is free from ambiguity, and the testator's intention is so manifested that, by giving the language employed by him its ordinary and legal signification, no doubt remains of the quantity or duration of the estate devised, a Court will not inquire into the motives which might have influenced the testator, in order to prove or infer that he meant to devise a different estate. *Ibid.*
3. A naked power or direction given by a will to an executor to sell land for the purpose of paying legacies or making distribution, does not vest in him any title to the land.—*Doe d. Clendenning et al. v. Lanius et al., Executors*, 441
4. The legal estate, in such case, is divested when the executor executes his trust, but, in the meantime, until a sale is made, it is in the heir, who is entitled to the profits. *Ibid.*
5. To cut off the heir at law, the estate must

be devised expressly, or by implication, to some other person. *Ibid.*

6. The course of the descent of an estate to the heirs at law can only be interrupted by a devise to some other person, whatever may have been the intention of the ancestor.—*McIntire et al. v. Cross et al.*, 444

WITNESS.

See EVIDENCE, 27. PROMISSORY NOTES, 5.

1. An opinion expressed by a witness, inconsistent with facts testified to by him, cannot be given in evidence to impeach his testimony.—*Pruitt v. Miller*, 16
2. A conviction of petit larceny does not render a person incompetent as a witness. *Ibid.*
3. An opinion expressed by a witness, inconsistent with a fact testified to by him, cannot be given in evidence to impeach his credit.—*Rucker v. Beaty*, 70
4. In an examination to impeach the credit of a witness by proof of his general bad character, the inquiry must be limited to his character at the time of the examination. *Ibid.*
5. It is no objection to the competency of a witness, in actions of replevin or trover, that he is called to prove the title of the property sued for to be in himself.—*Ashby v. West*, 170
6. In a suit upon a promissory note, a guarantor of the solvency of the maker is not a competent witness to prove that the note was executed without a consideration.—*Hanna v. Spencer*, 351
7. Objections to the competency of witnesses in a cause tried in 1842, must have been made at the trial or they will not be noticed by the Supreme Court.—*Zion et al. v. The State ex rel. Norris et al.*, 397

WORK AND LABOR.

See CONTRACT. SON-IN-LAW. SPECIFIC PERFORMANCE, 1.

WRIT OF ERROR.

See HABEAS CORPUS, 1. LAWRENCEBURGH AND UPPER MISSISSIPPI RAILROAD COMPANY.

A plaintiff who has suffered a voluntary non-suit cannot afterward prosecute a writ of error for a refusal of the Court, upon his motion, to reinstate the cause.—*Wilson v. The Aetna Insurance Company*, 557

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